IN THE

SUPREME COURT OF THE UNITED STATES

MARIAM MCALLISTER AS ADMINISTRATRIX OF THE ESTATE OF A. J. MCALLISTER, DECEASED,

Appellant,

against

THE CHESAPEAKE & OHIO RAILWAY COMPANY AND THE MAYSVILLE & BIG SANDY RAILWAY COMPANY,

Appellee.

Transcript of Record

Error to the District Court of the United States for the Eastern District of Kentucky, at Catlettsburg.

ALLAN D. COLE,
Maysville, Kentucky,
Attorney for Appellant.

WORTHINGTON, COCHRAN & BROWNING,
Maysville, Kentucky.

PROCTOR K. MALIN,
Ashland, Kentucky,
Attorneys for Appellee.

THE TOLEDO LEGAL PRINTING COMPANY,
PRINTERS.

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In the Supreme Court of the United States

No. .....

Mariam McAllister, Administratrix of the Estate of A. J. McAllister, Deceased,
Plaintiff in Error,

vs.

The Chesapeake & Ohio Railway Company and The Maysville & Big Sandy Railway Company,
Defendants in Error.

ORDER.

(Entered December 8th, 1902.)

This day came W. H. Wadsworth, attorney for defendant and in open court filed a transcript of the proceedings had herein in the Greenup Circuit Court, and on his motion, said case is placed on the Common Law side of the docket of this court.

TRANSCRIPT FROM THE GREENUP COUNTY CIRCUIT COURT.

(Filed Dec. 8, 1902.)

Pleas before the Hon. James F. Harbeson, Judge of the Greenup Circuit Court, at the court house thereof, in the town of Greenup, Kentucky, on Monday the 21st day of July, 1902.

Be it Remembered that on the 26th day of March,

1902, the plaintiff filed her petition in the clerk's office of the Greenup Circuit Court, and the same is in words and figures as follows:

PETITION.

The plaintiff, Miriam McAllister, as Administratrix of the Estate of A. J. McAllister, Deceased, states that on or about the 15th day of March, 1902, A. J. McAllister died intestate and resident and domiciled in Greenup County, Ky., and on the 26th day of March, 1902, plaintiff was by an order of the County Court of said county appointed administratrix of his said estate and thereupon qualified and is now acting as such administratrix. Copies of orders of said court showing her appointment and qualification as such are filed as part hereof marked "A".

The plaintiff further states that what is popularly known as the Chesapeake & Ohio Railway Company consists of three corporations, one created, organized and existing under the laws of Virginia; one created, organized and existing under the laws of West Virginia, and one created, existing and organized under the laws of Kentucky.

Plaintiff states that the Chesapeake & Ohio Railway Company and Maysville & Big Sandy Railroad Company are and were at all times hereinafter stated, corporations created, organized and existing under the laws of Kentucky except the Chesapeake and Ohio Railway Company was created, organized, existed and is existing under the laws of Virginia, West Virginia and Kentucky. That the Maysville & Big Sandy Railroad Company at the time hereinafter stated owned and now owns a line of railway extending through the County of Greenup and town of Fullerton and other counties in said State of Kentucky. Plaintiff states that at and before the times hereinafter stated and from a time before the year 1890 said railroad was operated by defendant, Chesapeake & Ohio Railway Company under a lease or contract thereof made to it by co-defendant, Maysville & Big Sandy Railroad Company, wherein it undertook to convey for a term of years which is yet unexpired, the said railway to defendant, Chesapeake & Ohio Railway Company; but which lease plaintiff avers was ultra vires, null and void, and in no wise relieves said Maysville & Big Sandy Railroad Company from liability for the torts of the said defendant, Chesapeake & Ohio Railway Company.

Plaintiff states that on or about the 15th day of March, 1902, while her said intestate A. J. McAllister, was a traveler and passing at a place in the said town of Fullerton where numerous people were accustomed to be and travel, which fact was at all times herein mentioned well known to all these said defendants, he was, without fault on his part, and while in plain view of these said defendants, their agents, servants and employes, then and there carelessly, negligently and wantonly run against and struck by a locomotive and engine and train of cars of the defendant, Chesapeake & Ohio Railway Company then and there operated and controlled jointly by the said defendants, as conductor nd as engineer and as fireman then and there in the employ of said Chesapeake & Ohio Railway Company, whereby said McAllister was so injured that he soon thereafter died thereof.

Plaintiff states that said defendants at the time and place aforesaid with gross and wanton negligence jointly drove, ran and operated said locomotive, engine and cars with great, excessive and dangerous speed, to-wit:—at the rate of (50) fifty miles an hour and with gross and wanton negligence defendants failed to have upon said locomotive, engine or train of cars, a proper or any look-out for travelers at such place and with gross and wanton negligence defendants jointly failed to give either from or by said locomotive, engine or train or otherwise any notice, signal or warning of any kind of the approach of said locomotive, engine or cars to said place and with gross and wanton negligence defendants then and there jointly failed to have at or near said place any watchman, device, apparatus or means to warn travelers at said place or to protect them from injury by locomotive, engine or cars moving thereat and the defendants were at the time and place aforesaid jointly in many ways and in many other respects grossly and wantonly negligent and because of all said negligence said A. J. McAllister was injured and his life destroyed as aforesaid. Plaintiff further states that at the time and place of the injury aforesaid to said A. J. McAllister, deceased, to-wit, March 15th, 1902, and divers and sundry days before and since then all through the year 1901 and 1902 to the present time the co-defendants and and were and are now still citizens and residents of the State of Kentucky and in the regular employ of the said defendant, Chesapeake and Ohio Railway Company; that on the day and at the

time of the injury aforesaid to said A. J. McAllister, deceased, they were jointly negligent in operating the said locomotive, engine and train of cars of the said Chesapeake & Ohio Railway Company at the place of injury to said intestate; that while so operating it and acting in the capacity of conductor, engineer and fireman respectively, jointly, under the employment of said company in the regular course of business of said company they did, as employes, with gross and wanton negligence run said locomotive engine and train of cars at said excessive rate of speed in said town and place and by reason of it and other negligences hereinbefore mentioned forced and drove the engine and cars against her said intestate, A. J. McAllister, as aforesaid, resulting in injuries from which he died; and further, that said defendants, their said agents, servants and employes saw or by the exercise of reasonable diligence could have seen her intestate, A. J. McAllister, in time to prevent said injury and consequently his death.

Plaintiff further states that by reason of the destruction of the life of the said A. J. McAllister as aforesaid, his estate has been damaged in the sum of ten thousand dollars ($10,000.00).

Wherefore plaintiff prays judgment against the defendants for ten thousand dollars in damages and her costs and all proper relief.

W. T. Cole and
A. E. Cole and Son,
Attorneys for Plaintiff.

On the 2nd day of April, 1902, the plaintiff filed in the clerk's office of the Greenup Circuit Court her amended petition and the same is in words and figures as follows:

AMENDED PETITION.

Now comes the plaintiff, Miriam McAllister, before answer filed and amends her petition and for amendment states that her intestate, A. J. McAllister, at the time of the injuries complained of was at or near a public crossing in said town of Fullerton, and that by reason of said injuries inflicted as aforesaid his estate has been damaged in the sum of $25,000.

Wherefore plaintiff prays for judgment for $25,000 and all proper relief.

W. T. Cole,
A. E. Cole and Son,
Attorneys for Plaintiff.

And afterwards, to-wit, on the 21st day of July, 1902, at a court held for the Greenup Circuit:

ORDERS.

The defendant, Chesapeake & Ohio Railway Company, filed a petition and bond herein, and moved the court for a removal of this cause to the Circuit Court of the United States for the Eastern District of Kentucky.

To which the plaintiff objects.

The court having examined said bond, does now approve the same.

The court having considered thereof adjudges that the motion for the removal of this cause to the Circuit Court of the United States for the Eastern District of Kentucky be overruled.

To which said defendant excepts.

PETITION FOR REMOVAL.

To the Honorable, the Circuit Judge of Greenup County, State of Kentucky:

Your petitioner, the Chesapeake and Ohio Railway Company, comes and respectfully shows it is one of the defendants in the above entitled suit, and that the matter and amount in controversy in the said suit, exclusive of interest and costs, exceeds the sum or value of $2,000.00; that the said suit is of a civil nature; that there is in the same a controversy which is wholly between citizens of different states which can be fully determined as between them, to-wit, a controversy between your petitioner, the Chesapeake and Ohio Railway Company, who avers that it was at the time of the bringing of this suit and still is, a corporation created, organized and existing under and by virtue of the laws of the State of Virginia, and a citizen of the State of Virginia and of no other State,—and the plaintiff, Miriam McAlister, administratrix of the estate of A. J. McAlister, deceased, which administratrix, your petitioner avers, was at the time of the bringing of this suit, and still is a citizen and resident of the State of Kentucky.

Your petitioner further shows that the said controversy is whether your petitioner is liable to plaintiff in damages on account of certain injuries which resulted in the death of her intestate, alleged to have been caused by reason of the negligence of your petitioner, and its co-defendant herein, the Maysville and Big Sandy Railroad Company; that on account of said negligence your

petitioner has damaged the estate of said McAllister in the sum of $25,000.00.

Your petitioner further states and shows that the co-defendant, The Maysville and Big Sandy Railroad Company, is a corporation and resident of the State of Kentucky, and is not a necessary or proper party or defendant to this cause; that the same can be determined between plaintiff and your petitioner without reference to either of said co-defendants, and that the said co-defendant is wrongfully, fraudulently and falsely made a defendant to this cause for the sole and single purpose of preventing a removal thereof, by your petitioner, to the Circuit Court of the United States, for the Eastern District of Kentucky, thereby unlawfully, wrongfully and fraudulently to deprive your petitioner of the right conferred upon it by the Constitution and Laws of the United States, and with no intention whatever on the part of plaintiff to prove any of the acts of negligence alleged in the petition against said co-defendant, or to prosecute the alleged cause of action against said co-defendant; and it states that the said co-defendant, Maysville and Big Sandy Railroad Company, has no property in this state subject to execution, and that your petitioner is entirely solvent,—all of which facts plaintiff well knew at the time of the bringing of this suit.

Your petitioner further shows that neither the petition or amended petition herein states any cause of action against the Maysville and Big Sandy Railroad Company, which company as shown by the petition, had leased to the Chesapeake and Ohio Railway Company before the year 1890, its entire line of railroad, which company, your petitioner avers, was duly authorized to make said lease at said date, and your petitioner was duly authorized to accept and take the same.

Your petitioner offers herewith a bond with good and sufficient surety, for entering in said Circuit Court of the United States, for the Eastern District of Kentucky, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this was wrongfully or improperly removed thereto, and it prays this Honorable Court to proceed no further herein except to make the order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed to the said Circuit Court of the United States, for the Eastern District of Kentucky.

And it will ever pray.

The Chesapeake and Ohio
Railway Company,
By W. H. Wadsworth,
Attorney.

State of Kentucky, County of Mason:

I, W. H. Wadsworth, being duly sworn, do say that I am one of the duly appointed and authorized attorneys for the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof; that the statements and allegations therein contained are true as I verily believe.

W. H. Wadsworth.

Subscribed by the said W. H. Wadsworth in my presence and by him sworn to before me this 21st day of July, A. D. 1902. My commission expires March 3rd, 1906.

W. D. Cochran,
Notary Public.

BOND.

Know All Men By These Presents, That We, the Chesapeake and Ohio Railway Company, as principal, and W. H. Wadsworth and J. G. Wadsworth, as sureties, are hereby held and firmly bound unto Miriam McAllister, as administratrix of the estate of A. J. McAllister, deceased, in the penal sum of one thousand dollars; for the payment thereof, well and truly to be made unto the said Miriam McAllister, as administratrix of the estate of A. J. McAllister, her heirs and assigns, we bind ourselves, jointly and severally, firmly by these presents:

Yet upon these conditions, the said Chesapeake and Ohio Railway Company having petitioned the Circuit Court of Greenup County, State of Kentucky, for the removal of a certain cause therein pending, wherein Miriam McAlister, as Admx. of the estate of A. J. McAlister, deceased, is plaintiff, and the Chesapeake and Ohio Railway Company & Als., are defendants, to the Circuit Court of the United States, for the Eastern District of Kentucky;

Now, if the said Chesapeake and Ohio Railway Company, your petitioner, shall enter in the said Circuit Court of the United States, for the Eastern District of Kentucky, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all cost that may be awarded by said Circuit Court of the

United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 21st day of July, 1902.

The Chesapeake and Ohio Railway Company,
By Wadsworth, Atty. (Seal)
W. H. Wadsworth (Seal)
J. G. Wadsworth (Seal)

State of Kentucky, Mason County, Sct.

We. W. H. Wadsworth and J. G. Wadsworth, both of Mason County, in said State, the sureties in the foregoing bond, being duly sworn, do depose and say, each for himself, that we are each of us worth the sum of one thousand dollars, over and above all our debts and liabilities and exclusive of property, by law exempt from execution, and that each have property in the State of Kentucky liable to execution and of the value of more than one thousand dollars.

W. H. Wadsworth,
J. G. Wadsworth.

Subscribed in my presence by W. H. Wadsworth and J. G. Wadsworth and by them sworn to before me this 21st day of July, 1902.

My commission expires on the 3rd day of March, 1906.

W. D. Cochran,
Notary Public.

(Seal)

State of Kentucky, County of Greenup, Sct.:

I, Charles W. Davidson, Clerk of the Greenup Circuit Court, do certify that the foregoing 11 pages contain a full, true and complete copy of such portions of the record and proceedings had in the cause therein mentioned as is required to be copied by the defendant, Chesapeake and Ohio Railway Company.

Given under my hand and the seal of said court at Greenup, Kentucky, this 7th day of August, 1902.

C. W. Davidson,
Clerk, Greenup Circuit Court.

(Seal.)

State of Kentucky, County of Fleming, Sct.

I James P. Harbeson, Judge of the Nineteenth Judicial District of Kentucky of which the County of

Greenup composes a part, do certify that Charles W. Davidson, whose genuine signature is affixed to the foregoing certificate, is and was at the time of signing the same Clerk of the Greenup Circuit Court, and full faith and credit are due and should be given all his official acts as such, and that his said certificate and attestation are in due form of law.

Given under my hand this 8th day of August, 1902.

Jas. P. Harbeson,
Judge 19 Judicial Dist. of Ky.

State of Kentucky, County of Greenup, Sct.

I, Charles W. Davidson, Clerk of the Greenup Circuit Court, do certify that James P. Harbeson, whose genuine signature is affixed to the foregoing certificate, is and was at the time of signing the same Judge of the Nineteenth Judicial District of Kentucky and Sole and Presiding Judge of the Greenup Circuit Court, and full faith and credit are due and should be given all his official acts as such, and that his said certificate and attestation are in due form of law.

Given under my hand and the seal of said court at Greenup, Kentucky, this 9th day of August, 1902.

(Seal.)

C. W. Davidson,
Clerk Greenup Circuit Court.

Cost of this Transcript	$3.25
Two Seals	2.00
Total	$5.25

ORDER.
(Entered May 22nd, 1905.)

This day came the C. & O. Ry. Co., by its attorney and now filed its answer herein. On motion of defendants it is now ordered that this case be and the same is specially set for hearing Wednesday, May 24th, 1905, the third day of this term.

ANSWER OF C. & O. RY. CO.
(Filed May 22, 1905.)

The defendant, the Chesapeake & Ohio Ry. Co. comes and for answer herein denies that what is popularly known as the Chesapeake & Ohio Ry. Co., consists of three corporations, or consists of one created, organized and existing under the laws of Virginia, and one created, organized and existing under the laws of West Virginia, and one created, organized and existing under the laws of Kentucky. It denies that the Chesapeake & Ohio Ry. Co. is, or was, at any time in the pleadings mentioned, or any other time, a corporation created, organized and existing under the laws of the State of Kentucky. It denies that the lease set up in the petition between Maysville & Big Sandy R. Co. and defendant was, or is, ultra vires, null or void, or that it in no wise releases the Maysville & Big Sandy R. Co. from liability from the torts of this defendant.

It denies that on the 15th day of March, 1902, or other day, the decedent A. J. McAlister, at the time of his injuries was a traveler on or passing a place in the town of Fullerton, or elsewhere, where numerous people were accustomed to be or travel, or that said alleged fact was at all or any times in the pleadings mentioned, or any other time, known to it or its co-defendant. It denies that A. J. McAlister, the decedent, at the time of his injury, was without fault, or that he was in plain

view of the defendants or either of them, or their agents, servants, or employes, or any of them. It denies that the said McAlister was then or there, or at all, carelessly, negligently, or wantonly run against or struck by a locomotive, or engine, or train of cars of this defendant, or that the same was then or there operated or controlled jointly by the defendants named as blank in the petition as conductor, engineer and fireman, or that thereby the said McAlister was so injured that he soon thereafter died, or was thereby injured at all. It denies that this defendant, or any other defendant, at the time or place mentioned in the pleadings, with gross or wanton negligence, jointly or at all drove, ran or operated said locomotive engine or cars with great, excessive or dangerous speed, or at the rate of fifty miles per hour, or with gross and wanton negligence failed to have upon said locomotive engine or train of cars, a proper or any lookout for trespassers at said place, or with gross or wanton negligence jointly or at all failed to give either from or by said locomotive engine, or train, or otherwise, any notice, signal or warning of any kind of the approach of said locomotive engine or cars to said place, or with gross or wanton negligence jointly or at all failed to have at or near said place, any watchman, device, apparatus, or means, to warn travelers at said place, or to protect them from injury by locomotive engine, or cars, moving thereat; and it denies that the decedent at the time of the injuries complained of, was at or near a public crossing in the town of Fullerton, but it avers that he was walking upon the private property and tracks of this defendant, and was a trespasser, and well knew that he had no right to walk thereon. It denies that it, or any other defendant, was at the time or place mentioned in the pleadings, jointly or at all in many ways, or in many other respects, or in any way, grossly or wantonly negligent, or that because of any of said alleged negligence, the decedent was injured or his life destroyed.

It denies that at the times mentioned in the pleadings, or any of them, it, and any defendant, were jointly or at all negligent in operating the said locomotive engine or train of cars at the place of injury, or that while so operating it, or acting in the capacity of conductor, engineer or fireman respectively, the employes named in blank, or any of them, jointly, or under the employment of this defendant, or in the regular course of business of this defendant, or as employes or otherwise, with gross or wanton negligence, or any negligence, ran said

locomotive engine or train of cars at the said excessive rate of speed in the said town or place, or that by reason of it or any other negligence in the pleadings alleged, forced or drove the engine or cars against said decedent, or that thereby he received injuries from which he died. It denies that it, or any defendant, or any servant or agent of the defendant, saw, or by the exercise of reasonable diligence, could have seen said decedent in time to prevent the injury to him or his death. It denies that by reason of any of the alleged acts of negligence the estate of decedent has been damagd in the sum of $25,000.00 or any other sum. Wherefore, &c.

The defendant answering states that at the time and on the occasion of the injuries complained of, the decedent A. J. McAlister, was guilty of negligence which contributed to his said injuries and death, and but for which negligence upon his part the injuries would not have been received and the death would not have been occasioned.

Wherefore having fully answered, the defendant prays that it be hence dismissed with judgment for its costs herein expended.

W. H. Wadsworth,
Attorney.

MOTION TO REMAND.
(Filed May 24th, 1905.)

And now comes the said plaintiff, and moves this court to remand the above-entitled cause to the Circuit Court in the County of Greenup and State of Kentucky, on the ground that this court is without jurisdiction to hear and determine the cause.

Wherefore, insisting upon plaintiff's exemption from suit in this court she says that not this court, but

the Circuit Court of the County of Greenup and State of Kentucky has jurisdiction in the premises.

Miriam McAlister, Adm'x., &c.,
Plaintiff,

By A. D. Cole, W. T. Cole and
A. B. Cole,
Her Attorneys.

ORDER.
(Entered May 24th, 1905.)

This day came the plaintiff by his attorney and filed motion to remand this case to the State court whence it was removed. The court being advised overruled said motion to which plaintiff by his attorney comes and excepts.

ORDER.
(Entered May 25th, 1905.)

This day came plaintiff by counsel and tendered and asked leave to file his certain plea to the jurisdiction of the court. Came the defendant by counsel and objected to the filing of said plea. The court being advised sustains said objection to the filing of said plea, to which ruling plaintiff by counsel excepts. Said plea so tendered is ordered to be and now is made part of the record. By consent of the parties, the court being advised, it is now ordered that this case be and the same is continued generally.

PLEA.
(Entered May 25, 1905.)

To the Honorable, the Judges of the U. S. Circuit Court for the Eastern District of Kentucky:

Plea of said Miriam McAlister as administratrix of A. J. McAlister, deceased, plaintiff, to the petition of said C. & O. Ry. Co. for removal of this cause to this court.

This plaintiff respectfully, by protestation, not confessing or acknowledging all or any of the matters and things in said petition of said C. & O. Ry. Co., for removal of said cause to this court, to be true in such manner and form as the same are therein set forth and alleged.

For plea to the whole of said petition or to so much and such part thereof as this plaintiff is advised that it is necessary for her to plead to, says that she admits that said Chesapeake & Ohio Ry. Co. is one of the defendants in the above entitled cause and that the matter and amount in controversy in said suit, exclusive of interest and costs, exceeds the sum or value of $2,000.00; that the suit is of a civil nature; that there is in the same a controversy between said plaintiff and said defendants as to whether said defendants are liable to plaintiff in damages on account of certain injuries which resulted in the death of her intestate, alleged to have been caused by reason of the negligence of said defendants and on account of said negligence the said defendants have damaged the estate of said McAlister in the sum of $25,000.00.

Plaintiff further admits that said C. & O. Ry. Co. at the time of bringing this suit and still is a corporation created, organized and existing under and by virtue of the laws of the State of Virginia and a citizen of the State of Virginia, and of no other state, and that said plaintiff was at the time of the bringing of this suit and still is a citizen and resident of said State of Kentucky; and plaintiff admits and says that said Maysville and Big Sandy Railroad Co. (said co-defendant herein), at the time of bringing this suit was and still is a corporation created, organized and existing under and by virtue of the laws of said State of Kentucky and a citizen of said State of Kentucky, and of no other state. And plaintiff further says, that in said suit there is thus presented a controversy not wholly between citizens of different states: and plaintiff denies that in said suit there is a controversy which is wholly between citizens of dif-

ferent states which can be fully determined between them, to-wit; the said C. & O. Ry. Co., and said plaintiff, Miriam McAlister, Adm'x., &c., and plaintiff further denies that said C. & O. Ry. Co., only, is liable to plaintiff in damages on account of certain injuries which resulted in the death of her said intestate, alleged to have been caused by reason of the negligence of said defendants; but she avers that both of said defendants herein are jointly liable to plaintiff in damages for a joint tort committed by them.

Plaintiff further denies that the said co-defendant, Maysville and Big Sandy Railroad Co., is not a necessary or proper party or defendant to this cause, or that the same can be determined between plaintiff and said C. & O. Ry. Co., without reference to either of said co-defendants or that said co-defendant, M. & B. S. Railroad Co., is wrongfully, fraudulently or falsely made a defendant to this cause for the sole or single purpose of preventing a removal of said cause to this court or unlawfully, wrongfully or fraudulently depriving the said C. & O. Ry. Co. of any right conferred upon it by the Constitution or Laws of the United States, or without intention on her part to prove the acts of negligence alleged in her said petition against said co-defendant, or without intention of prosecuting the alleged cause of action against said co-defendant.

Plaintiff further says that her said intestate, A. J. McAlister, was not an employee of either of said defendants, but at the time of his said injury and death, was a member of the public; that as to him said lease and transfer was and is illegal, ultra vires and void, and plaintiff denies that neither her said petition nor amended petition herein states any cause of action against the said Maysville and Big Sandy Railroad Co.

Wherefore, insisting upon her exemption from suit in this court, plaintiff says that not this court, but the Circuit Court in Greenup County, State of Kentucky, has jurisdiction in the premises.

Miriam McAlister as Adm'x., &c.,
Plaintiff,

By A. D. Cole, W. T. Cole and
A. B. Cole, Her Attorneys.

I hereby certify that in my opinion the foregoing plea is well founded in point of law, and the same is not made for delay merely.

A. B. Cole,
Solicitor for Plaintiff.

Eastern District of Kentucky, Boyd County.

A. B. Cole being first duly sworn deposes and says, that he is one of the attorneys for plaintiff in the above entitled cause, duly authorized in the premises; that said plaintiff is now absent from said Boyd County and that the facts and statements in the foregoing plea are true in point of fact and are not interposed merely for delay.

A. B. Cole.

Subscribed and sworn to before me by said A. B. Cole this 25 day of May, 1905.

Jos. C. Finnell,
Clerk.

ORDER.

(Entered December 1st, 1905.)

This day came the parties plaintiff and defendant by their respective attorneys and by consent of the parties the court being advised, it is now ordered that this case be and the same is continued generally.

ORDER.

(Entered May 28th, 1906.)

This cause coming on to be heard, came the parties plaintiff and defendant by their respective attorneys, and by agreement, the court being advised, it is now ordered and adjudged that this case be and the same is continued generally until the next regular term of this court.

ORDER.
(Entered December 10th, 1906.)

Came the plaintiff and defendant by their respective attorneys, and on their point motion, the court being advised, it is now ordered that this cause be and the same is hereby continued generally.

ORDER.
(Entered May 27th, 1907.)

By consent of the parties, it is now ordered that this case be and the same is continued generally until the first day of the next regular term of this court.

ORDER.
(Entered December 9th, 1907.)

On motion of the defendant, plaintiff not objecting thereto, it is now ordered that this case be and the same is continued generally.

MOTION.

(Filed Dec. 27, 1907.)

The plaintiff, Miriam McAllister as Admx. of A. J. McAllister, deceased, moves the court to set aside the order heretofore made denying her motion to remand this cause, and in lieu thereof to enter an order remanding the above style cause to Greenup Circuit Court because this court is not entitled to entertain jurisdiction thereof; and she files in support of this motion her answer traversing the allegations of the petition for removal.

Wherefore, etc.

W. T. Cole,
Attorney for Plaintiff.

ANSWER TO PETITION FOR REMOVAL.

(Filed Dec. 27, 1907.)

The plaintiff, Miriam McAllister as Admx. of A. J. McAllister, deceased, for answer to petition for removal herein denies that the Maysville & Big Sandy Railroad Company is not a necessary or proper party or defendant to this cause; or that the same can be determined between plaintiff and defendant, Chesapeake & Ohio Railway Company without reference to either of its co-defendants.

Plaintiff denies that the said Maysville & Big Sandy Railroad Company is wrongfully, fraudulently or falsely made a defendant to this cause for the sole or single purpose of preventing a removal thereof by the Chesapeake & Ohio Railway Company to this court, or thereby unlawfully or wrongfully or fraudulently deprive the said Chesapeake & Ohio Railway Company of any right conferred upon it by the constitution or laws of the United States.

Plaintiff denies that she made said joinder with no intention whatever on her part to prove any of the acts of negligence alleged in the petition against said Maysville & Big Sandy Railroad Company, and she denies that the said Maysville & Big Sandy Railroad Company has no property in this state subject to execution or that she knew or well knew any or all of said alleged facts at the time of the bringing of this suit, or at all.

Plaintiff denies that neither the petition nor the amended petition herein states any cause of action against The Maysville & Big Sandy Railroad Company, or that said Maysville & Big Sandy Railroad Company was duly authorized to make said lease at said date, or that the Chesapeake & Ohio Railway Company was duly authorized to accept or take the same except as operating agent of the Maysville & Big Sandy Railroad Company.

W. T. Cole,
Attorney for Plaintiff.

The affiant, W. T. Cole, says he is one of the attorneys for Miriam McAllister as Admx. of A. J. McAllister, deceased, who is now absent from Boyd County, and that the statements in the foregoing answer are true as he verily believes.

W. T. Cole.

Subscribed and sworn to by W. T. Cole before me this 27 day of Dec., 1907.

Jos. C. Finnell, Clerk.
By Jos. M. Spears, D. C.

ORDER.
(Entered May 25th, 1908.)

On plaintiff's motion, it is now ordered that this cause be and the same is submitted, upon plaintiff's motion to reconsider the ruling of the court in overruling his motion to remand this cause to the State Court. The parties have thirty days in which to file briefs and said case stands submitted upon said motion.

ORDER.
(Entered May 24th, 1909.)

This cause coming on to be heard upon the plaintiff's motion to reconsider the ruling of the court in heretofore overruling the motion to remand this case to the State Court, having considered said motion, and being now advised, the court overrules same, to which ruling plaintiff excepts.

ORDER.
(Entered December 13th, 1909.)

By consent of the parties, the court being advised, it is now ordered that his cause be and the same is continued generally for preparation.

ORDER.
(Entered May 23rd, 1910.)

This cause coming on to be heard, and neither plaintiff nor defendant appearing in person or by attorney, on the court's motion, it is now ordered that this case be and same is continued generally for preparation.

ORDER.
(Entered December 12th, 1910.)

By consent of the parties, this cause is continued until the next regular term of this court.

ORDER.
(Entered May 22nd, 1911.)

By consent of the parties, this cause is continued generally.

ORDER.

(Entered May 27th, 1912.)

This cause having been submitted on motion to reconsider order overruling motion to remand and the court being fully advised, now files written opinion herein. Whereupon, it is now ordered that the motion to reconsider order overruling motion to remand be and the same is overruled, to which ruling of the court comes plaintiff by counsel and objects and excepts.

OPINION OF JUDGE COCHRAN.

(Filed May 27th, 1912.)

This cause is before me on motion to reconsider motion to remand, heretofore overruled. The grounds of my action in overruling motion to remand may be found in the opinion delivered by me on application for a preliminary injunction in a suit in equity between the parties hereto, in which the defendant, Chesapeake & Ohio Railway Company, the non-resident and removing defendant, sought an injunction against the further prosecution of this suit in the state court after the filing therein of its petition and bond for removal, which application I sustained, my action in so doing being affirmed by the Court of Appeals for this circuit. The opinion is reported in connection with that of the Appellate Court.

McAllister vs. Chesapeake & Ohio Ry. Co., 157 Fed., 740.

The affirmance can hardly be said to have gone further than to approve my action in granting the preliminary injunction. The question whether the cause was removable was not necessarily involved and the Appellate Court withheld any expression of opinion on that subject.

The basis of the motion to reconsider is certain decisions of the Supreme Court of the United States and

of the Sixth Circuit Court of Appeals rendered since the order overruling the motion to remand, which, it is claimed on behalf of plaintiff, establish that I erred in so doing. The decisions relied on are as follows, to-wit:

I. C. R. R. Co. vs. Sheegog, 215 U. S., 308.
C. B. & Q. R. R. Co. vs. Willard, 220 U. S., 413.
Enos vs. Ky. D. & W. Co., 189 Fed., 342.

I am led, by the earnestness with which it is claimed that the case should be remanded, to consider the matter afresh. And, at the outset, the case as presented by plaintiff's pleadings should be well understood. Her intestate was killed by being struck by a train on defendants' railroad. The resident and non-removing defendant, Maysville & Big Sandy Railroad Company, was the owner of the railroad and the non-resident and removing defendant, Chesapeake & Ohio Railway Company, was in possession thereof and operating it under a lease from its co-defendant. The lease was made pursuant to legislative authority and was valid.

McCabe's Adm'r. vs. M. & B. S. R. R. Co., 112 Ky., 861.

The allegation as to the place where decedent was, when struck, is that he was "at or near a public crossing." It is the same as if it had been alleged that he was not on the crossing, and was, therefore, a trespasser. This has been so decided by the Court of Appeals of Kentucky. In the case of Davis, Adm'r. vs. Chesapeake & Ohio Ry. Co., 116 Ky., 144. Judge Paynter said:

"The averment that she was killed 'at or near' the private crossing should be construed that she was killed at a place on the track other than the crossing, because pleadings are to be construed most strongly against the pleader".

And again:

"But, under the rule that a pleading must be construed most strongly against the pleader, the averment that she was killed 'at or near" the crossing is equivalent to the averment that she was not killed on it, but near the crossing; hence she was a trespasser".

This being so, there was no duty on the part of the non-resident and removing defendant, the lessee, to be on the look out for him so as to be able to give him any warning of its train's approach or to exercise any care as to him until his presence was discovered.

Chesapeake & Ohio Ry. Co. vs. See, 79 S. W., 252.

Chesapeake & Ohio Ry. Co. vs. Nipp, 125 Ky., 949.

The negligence charged is failure to discover his presence and to give him suitable warning of the train's approach, and excessive speed. The allegation in that the "employees saw or by the exercise of reasonable diligence could have seen" the decedent. This was the same as if it had been alleged that decedent was not seen in time to avoid striking him. In the case of

King vs. Creekmore, 117 Ky., 172,

Judge Paynter said:

"The amended petition supplements the original petition with the averment that the defendant knew of the defective and dangerous condition of the boiler, or by the exercise of ordinary care could have known of it at the time it was leased. It will be observed that it is not averred that defendant knew (without the alternative statement that by the exercise of ordinary care he could have known) of the defective and dangerous condition of the boiler when leased to Warren; therefore, there is no charge that he was guilty of acting in bad faith. Taking the alternative averment in the light of the rule that a pleading must be construed strongly against the pleader, the only charge is that defendant was guilty of negligence in failing to exercise ordinary care to discover the defect in the boiler."

It follows, therefore, that plaintiff fails to state a cause of action against the non-resident and removing defendant, the lessee. And none being stated against it, none was stated against the resident and non-removing defendant, the lessor. For if the former was not liable for the death of plaintiff's intestate the latter certainly was not. It is only through and because of the lessee's liability that it is possible for the lessor to be liable in such a case. But for the time being, I pass this phase of the case and proceed to determine the removability of the case on the assumption that a cause of action is stated against the non-resident and removing defendant, the lessee, e. g. that it is alleged that decedent's presence was discovered in time to avoid striking him and it wantonly ran him down. In that case would the cause have been removable? This depends on two subordinate questions. One is whether it results therefrom, i. e. from such a cause of action being stated against the non-resident and removing defandant, the lessee, that one is stated against the resident and non-removing defendant, the lessor. The other is whether

if it does not so result, and there is, therefore, no cause of action stated against the latter, this circumstance, in and of itself, is sufficient to render the cause removable.

The determination of the first of these two questions must be in accordance with the law as laid down by the Court of Appeals of Kentucky. For, it is now well settled by the Supreme Court of the United States that, when a suit is brought in a state court by a non-resident against two defendants, one a non-resident and the other a resident, between the latter of whom and the plaintiff, therefore, there is no diversity of citizenship, in determining whether there is liability on the part of the resident and non-removing defendant and that jointly with the other defendant, which, if so, will render the cause non-removable, the law of the state where the suit is brought governs. This was so recognized and held in the Sheegog and Willard cases, supra, in each of which there was a suit against the lessee and lessor of a railroad to recover damages for a personal injury caused by the negligence of the lessee.

What we are concerned with, then, is the law of this state as so laid down, as to the liability of a lessor of a railroad for an injury caused by the negligence of the lessee where there is a valid lease. For, as heretofore stated, such is the case we have here. Three cases have arisen and been decided by the Court of Appeals of Kentucky involving this question. They are the cases of

McCabe vs. M. & B. S. R. R. Co., supra;
Swice vs. M. & B. S. R. R. Co., 116 Ky., 253;
Illinois Central R. R. Co. vs. Sheegog, 126 Ky., 252.

The first two of them were suits against the two defendants here. It is certain from these decisions that the lessor is not liable from the mere fact that the lessee is liable. This is so because, though in two of these three cases, to-wit; the McCabe and Sheegog cases, it was held that the lessor was liable because the lessee was; in the other one, to-wit; the Swice case, it was held that he was not. The things to be ascertained from them is the line of demarcation between cases where the lessor is liable because the lessee is and those where he is not. In the McCabe case plaintiff's intestate was a highway traveler and was struck by a passenger train operated by the lessee. The ground of the decision was that the duty of caring for highway travelers was imposed on the lessor by its charter and the grant of power to lease should not be construed as including a grant of absolution from that duty in case of a lease. Judge Hodson said:

"The obligation to fence the track for the protection of stock or to receive passengers or freight or carry them safely is no more a duty of the lessor imposed upon it by its charter than its duty to avoid injury to the traveling public in the discharge of its functions, as in this case. By its acceptance of the franchises conferred by the state the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. The grant of power to lease the property is one thing; the grant of absolution from its responsibility is another, and is not to be inferred from a mere power to lease the road, where the corporation still retains its existence and the enjoyment of its franchises in the rents".

In the Swice case the plaintiff's intestate was a servant of the lessee in its employ at one of its coal docks and he lost his life by its negligence in relation to an elevated platform on which he had to walk in the performance of his duties. The ground of the decision that the lessor was not liable was the absence of any such duty towards the servants of the lessee as existed in the case of highway travelers. In the McCabe case, in referring to cases where it had been held that the lessor was not liable for injuries to the servants of the lessee by reason of the lessee's negligence, Judge Hobson said:

"Those cases rest on the idea that the duty owed to the servant by his employer grows out of the contract of service which is voluntarily entered into by the servant, and that he does not stand to it like the public".

In the Swice case, in referring to the decision in the McCabe case, Judge Hobson said:

"It was there held that the lessor company continued liable to the public for the discharge of the obligation imposed on it by law".

In support of the decision reached in the Swice case he quoted from a note in 53 A. St. Rep., 140, these words:

"The duties which are owed by a railroad company to its servant are not duties owed to him in common with the public but grow out of the contract of service. He assumes the relation of servant to his employer and out of it arises the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public".

The Sheegog case was like the Swice case in that plaintiff's intestate was a servant of the lessee and lost his life by the negligence of the latter. The negligence there, however, was a failure to provide a safe roadbed as to which a duty was owed by the lessor to the public. It was on this ground that it was held that the lessor was liable. Judge Nunn said:

"But it is said that this responsibility of the lessor does not apply to the employees of the lessee of the road; that the lessor owed no duty to them; and that they are not members of the public in the sense used in decisions on that subject. It is true that the courts in part have made this distinction but have only extended the rule and exempted the lessor from torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased property, but hold the lessor bound for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc".

And again:

"It was alleged and proven that the intestate's death was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe roadbed".

In brief the point of decision in the Sheegog case was that the death of plaintiff's intestate was caused by the lessor's own wrongful act and the lessor was not held liable for the wrongful act of the lessee.

It is to be gathered from these three cases that the distinction between those cases where the lessor is liable and those where it is not is this: If the cause of the injury was the omission of a public duty, i. e. of a duty owed the public generally, then the lessor is liable, but if not and it was the omission simply of a duty owed the person injured growing out of the particular relation between him and the lessee then the lessor is not liable notwithstanding he may be said to be a member of the public. In the case of

Hukill vs. M. & B. S. R. R. Co., 72 Fed., 745-752,

Judge Taft said:

"The only cases where liability in tort is enforced against the lessor company are those where the person injured is a member of the public, with the right to rely upon the discharge of the public duties assumed by the lessor company in the operation of the road. Such per-

sons are shippers, who have a common law right to demand of the common carrier that he shall carry their goods safely, passengers, who have a common law right to demand of the common carrier that they shall be carried safely to their destination, and travelers upon the highway, who have a statutory and common law right to such a reasonable and careful operation of the road as shall not unduly injure them in their lawful rights".

These words are applicable here with this qualification, owing to the Sheegog case, that, though the person injured may not be a shipper, passenger or highway traveler, but a servant of the lessee, yet if the negligence which caused the injury was the omission of a duty owed the public generally and of which a shipper, or a passenger or a highway traveler could complain if his property or he is injured, the lessor is liable.

This places us in a position to decide whether the resident and non-removing defendant in this case, the lessor, is liable for the death of plaintiff's intestate had it been caused by the negligence of the non-resident and removing defendant, the lessee, in the operation of its freight train. He was neither a shipper, passenger nor highway traveler. He was a trespasser. He was not where he had the right to be as was the servant in the Sheegog case. His death was not caused by the omission on such defendant's part of a public duty, i. e. of a duty owed the public generally. It was caused by the omission of a duty to him alone, i. e. of not wantonly running him down, after his presence on the track was discovered, which, for the sake of the argument, we are assuming to have been alleged. In this particular the case is exactly like the Swice case where the death of plaintiff's intestate was caused by the omission of a duty owed him alone by reason of his being in the lessee's employ. In each the death was caused by the omission of a duty owed the decedent alone. They differ only in the basis of such duty. In the Swice case the basis was the contract relation between decedent and the lessee. Here it is the knowledge by the lessee of the decedent's peril, assumed to be alleged. In the Sheegog case and cases cited therein, in support of the conclusion there reached, it was emphasized that the employee, who was injured by the defective roadbed had a right to be where he was when injured. As for instance, in the case of

Nugent vs. Boston R. R. Co., 80 Me., 62,

cited in the Sheegog case, it is said that:

"The only materiality which attaches to the con-

tract between the companies is to make certain that the plaintiff was lawfully and not a trespasser on the defendant's road".

In the case of

Lee vs. Southern Pacific R. R. Co., 116 Cal., 97,

also cited therein, the court says:

"Plaintiff has pleaded and shown to the satisfaction of the jury that he was not a trespasser upon the railroad at the time and place where he met his injury, but that he was there under a lawful employment; that in pursuance of his vocation he met with an injury occasioned by defendant's defective construction of its roadbed for which injury the defendant is in law responsible".

Plaintiff's intestate when injured was not a shipper, or a passenger or a highway traveler. He was not where he had any right to be as was the servant injured in the Sheegog case, and in the Nugent case and in the Lee case.

It must be held, therefore, that the plaintiff's pleadings do not state a cause of action against the resident and non-removing defendant, the lessor, even though it be assumed that it states one against the non-resident and removing defendant, the lessee. This is so because there is no liability on the former's part for the alleged negligence of the latter.

Is then this circumstance sufficient in itself to make the cause removable? In support of the position that it is may be cited the following federal decisions, to-wit:

Nelson vs. Hennessey, 33 Fed., 113.
Rivers vs. Bradley, 53 Fed., 305.
Hukill vs. M. & B. S. R. R. Co., 72 Fed., 745.
Kelly vs. Chicago R. R. Co., 122 Fed., 290.
Bryce vs. Southern Ry. Co., 122 Fed., 709.
Williard vs. Spartansburg R. R. Co., 124 Fed., 796.
Axline vs. Toledo R. R. Co., 138 Fed., 168.
Chicago R. R. Co. vs. Stepp, 151 Fed., 908.
Lockhard vs. St. Louis R. R. Co., 167 Fed., 675.
Marach vs. Columbia Box Co., 179 Fed., 412.
Floyt vs. Shenango Furnace Co., 186 Fed., 539.

These cases are all personal injury cases. In the first, the Nelson case, the two defendants sued were, respectively, the owner and the tenant of a building, which

had fallen and caused the injury. Plaintiff's claim was that each defendant owed the duty of caring for the safety of the building and hence sued them together. In the last two, the Marach and Floyt cases, the two defendants sued bore towards each other the relation of master and servant. The person injured was a servant also. The master in the one case was the operator of a box factory, the injury being caused by a defective platform, and, in the other, he was the operator of a coal mine, the injury being caused by a defective ladder. Plaintiff's claim in the Marach case was that each defendant owed the duty of caring for the safety of the platform and in the Floyt case of caring for the safety of the ladder. The duty of the master relied on in each case was its non-delegable duty to provide a reasonably safe place in which to work and that of the servant, to whom it had entrusted the performance of such duty, to inspect and to discover and report the defect. Hence the plaintiff in each instance sued the master and servant together.

In the cases intervening between the first and last two cases, i. e., in the Rivers, Hukill, Kelly, Bryce, Williard, Axline, Stepp and Lockhard cases the injury was received in connection with the operation of a railroad train. In the Rivers, Kelly, Bryce, Stepp and Lockhard cases, the two defendants sued, as in the Marach and Floyt cases, bore towards each other the relation of master and servant and in the Rivers case, as in those cases also, the person injured was a servant also. He was a brakeman and the servant sued was the engineer of the train. The injury was caused by the deafness and defective vision of the latter, i. e., by a defective engineer and a defective car. The duties of the master whose breach was relied on were its nondelegable duties of providing competent servants and reasonably safe appliances. It is not apparent what duty on the part of the engineer it was claimed had been breached, unless it was not to act as such in his defective condition. But under a claim of liability on the part of both for the injury plaintiff sued both. In the Kelly and Bryce cases the person injured was a passenger. In the Kelly case he was injured by the explosion of the locomotive and in the Bryce case by the derailment of the train. The servant sued in the one case was the yardmaster and in the other the engineer of the train. The duty of the master whose breach was relied on in each case was its duty as a common carrier to exercise the highest degree

of care for the safety of its passengers. That of the yardmaster in the Kelly case was to inspect and to discover and report the defect in the locomotive which caused the explosion and that of the engineer in the Bryce case was to operate the train with due care for the safety of the passengers, to each of whom the performance of its duty had been entrusted by the master. There was no allegation in the Bryce case of any specific negligence on the engineer's part, the allegation being general, i. e. that the derailment was caused by his negligence. In the Stepp and Lockhard cases the person injured was run into by the train whilst on the track, presumably in each instance a trespasser, as here. The servant sued in each instance was the engineer of the train. The duty of the master whose breach was relied on in each case was to be on the lookout for persons on the track, whether trespassers or not, prescribed by statute in the particular jurisdiction where it arose. The performance of this duty had been entrusted by the master to the engineer but the statute prescribed no duty on the engineer personally to be on the lookout. The claim was, however, that he so owed such duty and hence he was sued along with the master.

In the Hukill, Williard and Axline cases the two defendants bore towards each other the relation of lessee and lessor, the same as here—in the Hukill case the two defendants being the two defendants here. In each case the person injured was a servant of the lessee, the same as the Swice case, decided by the Kentucky Court of Appeals, and heretofore cited, the Hukill and Swice cases being alike in all particulars. The duty on the part of lessee whose breach was relied on was a certain one of the nondelegable duties owed by the master to the servant. Seemingly there was no claim that the lessor had breached any duty owed by it to the person injured, the claim going no farther than that the lessor was liable because the lessee was liable.

In the owner and tenant case, i. e., the Nelson case, the owner was the nonresident and the tenant the resident defendant; in the master and servant cases, i. e. the Rivers, Kelly, Bryce, Stepp, Lockhard, Marach and Floyt cases the master was the nonresident and the servant the resident defendant; and in the lessee and lessor case i. e. the Hukill, Williard and Axline cases, the lessee was the nonresident and the lessor the resident defendant. In each of the entire eleven cases the removal was at the instance of the nonresident defendant and the question

which each presented was whether the presence of the resident defendant as a party affected the removability of the cause.

In the owner and tenant case, i. e. the Nelson case; in the first of the master and servant cases, i. e. the Rivers case; and in each of the lessee cases, i. e. the Hukill, Williard and Axline cases, the resident and nonremoving defendant had no connection whatever with the negligence charged against the nonresident and removing defendant and upon which the claim of liability on its part was based. It was through no act or omission of the one that the other can be said to have been negligent and hence liable. In the lessee and lessor cases, i. e. the Hukill, Williard and Axline cases, it was the other way. The resident and nonremoving defendant, the lessor, was claimed to be liable because of the negligence of the nonresident and removing defendant, the lessee. In the owner and tenant case, i. e. the Nelson case, and in the first of the master and servant cases, i. e. the Rivers case, neither defendant was chargeable or claimed to be chargeable with the other's negligence.

In all of the master and servant cases, except the Rivers case, i. e. in the Kelly, Bryce, Stepp, Lockhard, Marach and Floyt cases, the master, the nonresident and removing defendant, had entrusted to the servant, the resident and nonremoving defendant, the performance of the duty which it owed the person injured, i. e. the passengers in the Kelly and Bryce cases, the trespassers in the Stepp and Lockhard cases and the co-servants in the Marach and Floyt cases and whose breach was relied on as making it liable, and it was through his failure to perform same that the claim of its breach arose. The servant sued, however, in thus bringing about liability on the part of the master was, as held therein, himself guilty of no breach of duty owed by him to the person injured. This possibly was an error in the Bryce case. In all of these six master and servant cases, except that case, the duty of the servant sued was that of discovery and this duty, it was held, he owed not to the person injured but to the master. In the Bryce case it would seem that the servant sued owed the person injured, to-wit the passenger, the duty of operating the train with due regard to his safety.

In none of these eleven cases, then, had the resident and nonremoving defendant, except possibly in the Bryce case, been guilty of a breach of any duty owed by him to the person injured and it was not liable for

the breach by the resident and nonremoving defendant of the duty which it owed that person. In the master and servant cases, except the Rivers case, however, he was guilty of a breach of duty, but except possibly in the Bryce case, it was a duty owed to the nonresident and removing defendant, the master, and not to the person injured. In no one of these cases, therefore, was a cause of action stated against such defendant, except possibly in the Bryce case, the only ground for holding that none was stated therein being that no particular negligence was specified. And this circumstance that no cause of action was so stated was in and of itself held to be sufficient to render the cause removable.

It has likewise been so held by the Court of Appeals of Kentucky in a number of decisions, to-wit:

C. N. O. & T. P. R. R. Co. vs. Robertson, 115 Ky., 858.
Davis vs. C. & O. R. R. Co., supra.
Swice vs. M. & B. S. R. R. Co., supra.
Slaughter vs. Nashville R. R. Co., 91 S. W., 744.

And it is the well settled practice in this state, as sanctioned by numerous decisions of that court that, though a cause of action may be stated against the resident and nonremoving defendant, yet, if on the trial before the jury the plaintiff fails to present sufficient evidence to justify submitting the question to the jury, the trial should cease at once and the case be removed to the federal court. The earliest case where this practice was approved is that of

Illinois Central R. Co. vs. Coley, 121 Ky., 385.

To the same effect are the cases of

Dudley vs. Illinois Central R. R. Co., 127 Ky., 221.
Underwood, Adm'r, vs. Ill. Cent. R. R. Co., 103 S. W., 322.
Haynes' Adm'r vs. C. N. O. & T. P. R. R. Co., 145 Ky., 209.

I will not analyze any of these Kentucky decisions as I have done with regard to the federal decisions cited, but there can be no question that the law as settled by the Court of Appeals of Kentucky is that the fact that the plaintiff's petition fails to state a cause of action against the resident and nonremoving defendant, in and of itself without more, renders the cause removable.

The why of this position has not been much dis-

cussed. No reference thereto whatever is made in the decisions of the Kentucky Court of Appeals. They simply take it for granted that this is so. In the Nelson case the position is placed on the ground that the resident and nonremoving defendant is a merely nominal party. Judge Brewer said:

"It is claimed that this is an action for a joint tort, and therefore, unless both defendants have a right of removal, this court cannot take jurisdiction, and the case must be remanded. This is undoubtedly true if the complaint discloses a joint tort. But it is also true that, where there has been a tort committed by one party, the plaintiff cannot join another and merely nominal party as defendant so as to prevent a removal to which the real defendant is entitled."

Then, as to the tenant's liability and the result of his nonliability he said:

"Clearly so far as disclosed he was under no responsibility for the injury. He was, therefore, improperly joined. The only real party is the owner of the building, and, as he is a citizen of another state, he is entitled to a removal to this court."

This idea was accepted in the Rivers, Bryce, Williard, and Axline case.

In the Bryce case Judge Simonton said:

"It appears from these authorities that no actionable charge of negligence has been made against these two defendants, the conductor and engineer. No cause of action has been stated against them. This being so, the only controversy in the complaint is that of the railway company, and the insertion of the names of these two defendants in the complaint cannot prevent the removal of the cause into this court."

And in the Williard case the same learned judge said:

"It is clear from all that has been said that the Spartanburg Union & Columbia Railroad Company has no interest whatever in the issue in this case, that it is neither a necessary nor a proper party. This being so and the Southern Railway Company, the only other defendant, being the only party against whom a cause of action is stated and a citizen of the State of Virginia had the right to remove the cause into this court. * * * It is unnecessary to consider whether the Spartanburg Union & Columbia Railroad Company is a sham party, or that its name was inserted to defeat the jurisdiction of this court—a proposition the court will not willingly entertain and would be loath to believe."

In the Lockhard case Judge Rogers placed it on the ground of separable controversy. He said:

"It follows that there is no cause of action stated against the engineer in any aspect of the complaint. The real cause of action in this suit is one against the railroad company only, in which Daniels is made a party without any semblance of liability—joint or otherwise. It matters not, therefore, whether the intent of the pleader was to make Daniels a party to defeat the jurisdiction of the court or not, since in any event, without reference to the purpose, the complaint states no cause of action, as stated, against him, and no cause of action being stated against him, the railroad company had the right to remove the cause against it to this court. In other words the cause of action is made separable because there is no cause of action stated against Daniels."

In Floyt vs. Shenango Furnace Co., Judge Amidon placed it on the ground that the joinder of the resident and nonremoving defendant was fraudulent. After referring to the point decided in the case of

Wecker vs. National Enameling Co., 204 U. S., 176,

a case of fraudulent joinder, due to the allegation of a fact known to be untrue for the purpose of stating a cause of action against the resident and nonremoving defendant on the face of the petition and thus preventing a removal, he said:

"If a showing by affidavit that the plaintiff has no cause of action as against the employe will sustain a removal by the other defendant, surely that result ought to follow when the complaint on its face makes the same disclosure. There can be no higher evidence that the joinder is fraudulent than the fact that on the face of the complaint, under well established principles of law, no cause of action is stated against the employe."

According to this the basis of the position in question is that there has been a fraudulent joinder and seemingly every case of a failure to allege a cause of action against such defendant is a case of fraudulent joinder. This is hardly consistent with the earlier decision of the same court held by a different judge in the case of

Jacobson vs. Chicago R. R. Co., 176 Fed., 1004.

That was a personal injury case also. The two defendants sued bore towards each other the relation of master and servant and the person injured was a servant

also. The master was the operator of a railroad and the injured servant a coal shoveler at a certain station on the line. The injury was caused by a defective platform on which he was at work. The duty of the master whose breach was relied on was its nondelegable duty of providing a reasonably safe place in which to work and that of the servant, to whom it had entrusted the performance of this duty, was to inspect and to discover and report or possibly to repair. Hence plaintiff sued both together. The master was the nonresident and removing defendant and the servant the resident and nonremoving defendant. The cause was removed at the instance of the former. It claimed that the duty of the resident and nonremoving defendant, the servant, was a duty owed the master and not the injured servant, that in consequence of this no cause of action was stated against such defendant and that therefore, the cause was removable. It is thus seen that the case is exactly like the later Floyt case. It was held that the cause was not removable and it was remanded to the state court. Judge Willard said:

"But it is said by the defendants that, even if the defendant, Hutton was charged with the duty of inspecting this platform, the complainant states no cause of action against him, for it alleges only a duty imposed upon him in favor of his employer, the railroad company, and for a breach of that duty by a failure to inspect no cause of action arises in favor of the plaintiff. In other words, for nonfeasance an action lies only in favor of the master, and not in favor of a third person; the theory being that an employe in such cases owes no duty to such third person. This contention presents a question of law and it must be determined where that question should be decided, which court has the right to say whether the complaint states a cause of action or not?"

Referring to the case of

Alabama Southern Ry. Co. vs. Thompson,
200 U. S., 221,

which was a case where a cause of action was stated against the resident and nonremoving defendant, as well as the nonresident and removing defendant, and the sole question was whether the two were jointly liable and hence could be sued together and it was held that the claim of the plaintiff that they were jointly liable rendered the cause not removable, he said:

"The case of Alabama Southern Ry. Co. vs. Thomp-

son was decided on the principle that the cause of action was what the plaintiff in good faith said it was."

From this he argued:

"If that is true when the question is whether the liability is joint or several, it must be true also when the question is whether the facts alleged show any liability at all on the part of the defendant employe. If the plaintiff in good faith says that they did, the case cannot be removed. So upon this branch of the case, as upon the other, the point to be determined is whether the plaintiff has acted in good faith in asserting that Hutton is liable to him for failure to inspect. An examination of the authorities will show that this is a doubtful question. * * * A plaintiff, who claims under such circumstances as appear in this case, mere nonfeasance creates a liability in his favor, cannot be said to make such claim in bad faith, even though the court should be of the opinion that the complaint would be held bad on demurrer presented by the employe."

I doubt whether a case of fraudulent joinder is ever presented in the absence of fraud in the matter of allegation of facts on which liability on the part of the resident and nonremoving defendant is based, i. e., except where on the facts alleged a cause of action against such defendant is stated and they have been alleged with the knowledge that they were untrue or without reasonable ground for believing that they were true and with the animus to affect the removability of the cause by such graud. If this is so then in such cases the question of good faith relates solely to the allegation of fact and not to the claim in law, for everybody is conclusively presumed to know what the law is. It is certain that no question of good faith or fraudulent joinder arises when the sole basis for the claim that the one is lacking and the other exists lies in the motive of the plaintiff in joining the resident and nonremoving defendant. Judge Taft made this clear in the Hukill case, supra. And it may be that no such question arises when the sole basis for such claim is to be found in plaintiff's claim as to matter of law. I find it difficult to gather from the case of Alabama Southern Ry. Co. vs. Thompson that, where the plaintiff's pleading alleges facts showing liability on part of both defendants and it is not claimed that such facts, in so far as they show liability on part of the resident and nonremoving defendant, have been fraudulently alleged, a case of fraudulent joinder can grow out of the mere claim that there

is joint liability so as to justify suing the two defendants together. The impression which the case makes on me is that in such a case the claim of joint liability by plaintiff is conclusive in all cases, except, perhaps, where the highest court of state where the suit is brought has previously decided that there is no joint liability and, in such a case, the idea of fraudulent joinder is, perhaps, not needed to make the cause removable. But it seems to me that in determining whether or not the eleven federal decisions and those of the Kentucky Court of Appeals heretofore cited are on principle sound, i. e. whether or not the mere fact that no cause of action is stated against the resident and nonremoving defendant is sufficient, in and of itself, to render the cause removable, the language of that portion of the Removal Act which is relevant must be reckoned with and that its true meaning is all that is relevant. There is nothing in it about fraudulent joinder, separable controversy or nominal parties. It is in these words:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

This presupposes that there may be in a suit "a controversy which is wholly between citizens of different states and which can be fully determined as between them" which does not cover all that is therein. Where such is the case it is provided that "one or more of the defendants actually interested in such controversy" may remove the suit. Where, then, the plaintiff fails to allege facts which present a cause of action against the resident and nonremoving defendant is it or not to be said that there is a controversy in the suit to which such defendant is no party and which is wholly between the plaintiff and the nonresident and removing defendants and which can be fully determined as to them. It is true that in such a case the plaintiff is claiming that the former as well as the latter is liable for the injury complained of, but as no facts are alleged showing liability on his part, does it not follow that the controversy as to the liability of the latter under the facts alleged is one that is wholly between plaintiff and the latter and one that can be fully determined as between them within the meaning of the provision?

I find it somewhat difficult to answer these questions satisfactorily to myself, and the relevant decisions do not yield much help in answering them, because, so far as my reading has gone, I do not find that any court has come to close quarters with the exact meaning of this provision of the Removal Act and pointed out exactly what is covered by it and what not. It is well settled by the Supreme Court of the United States that in determining whether a particular case is covered thereby the view must be limited to the allegations of the plaintiff's pleadings. But it has laid down no clear line between those cases which are covered by it and those which are not. It has never had occasion to deal with the question now under consideration. It would seem that according to its view but few cases can arise coming within its purview. This appears from Judge Lowell's citation and characterization of the decisions of the Supreme Court dealing with the removability of a suit because of the presence in it of what is called a separable controversy in the case of

Regis vs. United Drug Co., 180 Fed., 201.

Yet, if the necessities of this case were such as to require my taking position on the question as to whether the fact that no cause of action is stated against the resident and nonremoving defendant renders the cause removable, I would feel compelled to give the numerous decisions of the Supreme Court thereby referred to a very careful consideration. Each separately would have to be subjected to a very close and keen criticism and after so doing they would have to be viewed together—this in order to extract their essence. Otherwise I would not feel properly equipped to deal with the question. And this is a work that should be done by some one.

This possible view of the matter, however, occurs to me in this connection. In the case of

Powers vs. C. & O. R. R. Co., 169 U. S., 92,

Mr. Justice Gray said:

"The cause of action is the subject-matter of the controversy, and that is, for all purposes of the suit, whatever the plaintiff discloses it to be in his pleadings."

If, then, there is no cause of action stated against the resident and nonremoving defendant, i. e., if the cause of action stated against the nonresident and removing defendant is not a cause of action against him or it, also, can it be said that he or it is a party to the controversy between the plaintiff and the nonresident

and removing defendant as to the cause of action stated against it, and, if not, is not that controversy one, that is wholly between such defendant and plaintiff, and, that can be fully determined as between them within the meaning of the provision? But the necessities of this case do not require that I should take such position.

It is apparent from the recent decisions of the Supreme Court that in such cases as we have here, it shows much respect to the position of the highest court of the state where the case arises, if indeed it does not regard it as conclusive. Now, it is as well settled in Kentucky as it is possible for it to be that where the plaintiff's pleading states no cause of action against the resident and non-removing defendant the cause is removable. This can only be because it is considered that in such a case the plaintiff's pleading presents a controversy which is wholly between him and the nonresident and removing defendant and which can be fully determined as between them. And, if that is really so, there can be no question that the case is covered by that provision of the Removal Act. But, if, for such a suit to be removable, it is essential that fraud be made out in the claim that as a matter of law on the facts alleged there is liability on the part of the resident and nonremoving defendant, this case presents such fraud, in that there was no reasonable basis for the claim that the resident and nonremoving defendant here, the lessor, was liable for the injury complained of. It is true that the Kentucky Court of Appeals has never held that the lessor of a railroad is not liable for an injury to a trespassor thereon caused by the lessee in the operation of one of its trains. But the principles upon which it held that the lessor was liable in the McCabe and Sheegog cases and was not liable in the Swice case require that it should so hold, whenever such question shall be presented to it. And there seems to be no room for reasonable doubt as to this. These considerations lead me to the conclusion, on the assumption upon which I have been proceeding, that this cause was removable. That assumption is that the plaintiff's pleadings here state a good cause of action against the nonresident and removing defendant.

Does, then, the fact that they do not so state, in that the negligence charged is failure to discover the presence of plaintiff's intestate on the track in time to have warned him of the approach of the train and thus to have avoided the injury, make any difference? I do not see

why it should. The resident and nonremoving defendant is still no party to the controversy to which the nonresident and removing defendant is a party and that controversy is wholly between it and plaintiff and can be fully determined as between them; and the same ground exists for saying that the joinder of the resident and nonremoving defendant was fraudulent.

It remains to say a word or two as to the cases cited and relied on by plaintiff. The Sheegog case was carried to the Supreme Court of the United States from the Kentucky Court of Appeals, whose decision therein has been heretofore referred to, and that court affirmed the decision of the lower court. If, as we have found, that decision is not against the removability of this cause its affirmance by the Supreme Court is not. The Supreme Court held that it was bound to accept the decision of the lower court that the resident and nonremoving defendant, the lessor, was liable for the death of plaintiff's intestate, a servant of the nonresident and removing defendant, the lessee, caused by the negligent performance of the duty owed the public to provide a safe roadbed, and that such liability was joint with that of the removing defendant the lessee, as sound, and, that, such joint liability existing, the cause was not removable even though the joinder had been made for the express purpose of preventing a removal. In such a case there can be no such thing as a fraudulent joinder.

The decision in the Willard case was substantially the same, though the liability of the resident and nonremoving defendant, the lessor, was placed on a different ground. The cause originated in one of the courts of original jurisdiction in the state of Illinois, from whence it was removed to the federal court. That court having taken jurisdiction, its judgment was reversed by the Circuit Court of Appeals for the Seventh Circuit for want of jurisdiction and its judgment was affirmed by the Supreme Court on certiorari. The law of the state of Illinois as determined by its Supreme Court is that the lessee of a railroad is the mere servant or agent of the lessor.

In the case of Chicago R. R. Co. vs. Hart, 209 Ill. 414, cited in the Willard case, it is said:

"Though a railroad company may, by lease or otherwise, entrust the execution of its charter powers and duties to a lessee company, this court has expressed the view that the lessee company, while exercising such chartered privilege or chartered powers of the railroad com-

pany is to be regarded as the servant or agent of the lessor company."

Of course in jurisdictions where this is the law it must be held that the lessor, in all cases, is liable for the lessee's negligence. So in the Willard case, Mr. Justice Harlan said:

"It results that upon the face of the record, the action throughout was proceeded on as a joint action, and that there was no separable controversy in such an action, entitling the Iowa Corporation, as a matter of law, to remove the case from the state court. And it cannot be predicated of the plaintiff that he fraudulently and improperly made the Illinois Corporation a co-defendant with the Iowa Corporation when such a charge is negatived, as a matter of law, by the fact that the plaintiff was, as we have seen, entitled under the laws of Illinois, where the cause of action originated and within which the road was located, to bring a joint action against the Illinois and Iowa Companies."

It must be accepted, therefore, that there is nothing in this decision of the Supreme Court, as there was nothing in the Sheegog case, requiring a remand of this action to the state court.

The Enos case decided by the Appellate Court of this Circuit was not a suit against a lessee and lessor of a railroad to recover of both for the lessee's negligence. It was a suit against a master and servant to recover of both. The servant was the resident and nonremoving and the master the nonresident and removing defendant. The injured person was a servant also. It arose in this state and was brought in the Circuit Court for Jefferson County from whence it was removed to the Circuit Court of the United States for the Western District. Motion to remand having been overruled and the suit having resulted in judgment for defendant the case was carried to the Appellate Court. It was there held that the suit was not removable and the judgment of the lower court was reversed with directions to remand to the state court. The plaintiff's petition stated a good cause of action against both defendants—that against the resident and nonremoving defendant, the servant, being his personal negligence, alleged to have caused the injury, and that of the nonresident and removing defendant, the master, the negligence of the servant. Not otherwise was a case stated against the latter. That being so the cause was not removable in the absence of a fraudulent joinder. This had been recognized by the lower court and the sole

ground of removal was that there had been a fraudulent joinder. This was attempted to be made out by showing that the injury was due to the negligent performance of the person injured of the work he was doing when injured and not to any negligence of the resident and nonremoving defendant, and that there was no reasonable basis for claiming otherwise. If the claims as to the cause of the injury was correct then the plaintiff had no cause of action against either defendant, for the nonresident and removing defendant was not liable except through the negligent act of the resident and nonremoving defendant. It was held that a fraudulent joinder in such a case could not be made out by showing that plaintiff had no reasonable basis for claiming that he had a cause of action against either defendant. Judge Knappen said:

"The Circuit Court in denying the motion to remand practically found that plaintiff was affirmatively shown to have no cause of action against any of the defendants. The assertion of fraudulent joinder of O'Hearn and Bittner necessarily involves the proposition that the cause of action against even the resident defendant was fraudulently asserted. But the rule which permits a removal to the federal court in case of a fraudulent joinder of defendants whose presence destroys diversity of citizenship cannot be carried to the extent of permitting such fraudulent joinder to be inferred from the fact only that no cause of action is found to exist against any defendant, resident or nonresident, or of permitting a removal in a case where the negligence of the corporate defendant can be made out only by proof of negligence of the servant alleged to be fraudulently joined but against whom a cause of action is stated."

I see nothing in this decision that militates against the position here taken. In view of these considerations, therefore I am constrained to overrule the motion to set aside the order overruling the motion to remand.

A. M. J. Cochran,
Judge.

May 27, 1912.

ORDER.
(Entered December 9th, 1912.)

By consent of counsel, the court being advised, it is now ordered that this cause be continued.

ORDER.
(Entered May 26th, 1913.)

By agreement of counsel, it is now ordered that this cause be continued generally.

ORDER.
(Entered May 25th, 1914.)

This day case defendant by counsel and on motion of defendant, the court being advised, it is now ordered that this cause be and the same is dismissed for want of prosecution.

MOTION.
(Entered May 25th, 1914.)

Now comes defendants and move the court to dismiss this cause for want of prosecution.

Worthington, Cochran & Browning,
Proctor K. Malin,
Attorneys for Defendants.

ORDER.
(Entered May 29th, 1914.)

On motion of plaintiff, the court being advised, it is now ordered that the order dismissing this cause for want of prosecution entered herein on May 25, 1914, be and the same is set aside. It is further ordered that this cause be and the same is continued.

ORDER.
(Entered December 24th, 1914.)

On the court's motion, this cause is continued generally.

ORDER.
(Entered December 15th, 1915.)

This day came defendants, by counsel, and on their motion, the court being advised, it is now ordered that this cause be and the same is now dismissed for want of prosecution to which ruling plaintiff by counsel objects and excepts.

ORDER.
(Entered April 13th, 1916.)

This day came plaintiff, by counsel, A. D. Cole, and filed motion to set aside order dismissing this cause, heretofore entered herein.

MOTION.
(Filed April 13, 1916.)

The plaintiff, Mariam McAllister as administratrix of A. J. McAllister, deceased, moves the court to set aside the order entered herein on or about the 13th day of December, 1915, dismissing her case for the want of prosecution; because the same was entered through a misunderstanding.

Allan D. Cole,
Attorney for Plaintiff.

ORDER.
(Entered July 24th, 1916.)

The court having considered of plaintiff's motion entered at a former term of this court to set aside an order made at said term to dismiss the above styled cause for want of prosecution, and being sufficiently advised, sustains the same and now adjudges that said order be and the same is hereby set aside and held for naught.

JUDGMENT.
(Entered July 24th, 1916.)

The court having at a former term thereof overruled plaintiff's motion to remand this cause to the Greenup Circuit Court, which ruling is now re-affirmed, and plaintiff having elected to stand upon her motion to remand and refusing to recognize the jurisdiction of the United States Court or to proceed with the prosecution of her cause therein; it is upon motion of defendants ordered and adjudged that said cause be and the same is hereby dismissed; and that plaintiff take nothing by her suit; and that the defendants go hence without day and recover their costs herein against the plaintiff to be levied out of the assets that have come and may come into her hands as administratrix of A. J. McAllister, deceased.

To all of which plaintiff objects and excepts.

ASSIGNMENT OF ERRORS.

(Filed July 25, 1916.)

Now comes the above named plaintiff in error, Mariam McAllister as Administratrix of A. J. McAllister, deceased, by Allan D. Cole, her attorney, and says that in the record and proceedings in the above entitled matter there is manifest error in this, to-wit:

I.

That the United States District Court for the Eastern District of Kentucky erred in holding and deciding that the said court had jurisdiction to try and determine said suit, and in rendering its judgment dismissing plaintiff in error's petition therein on that ground.

II.

That said court erred in overruling plaintiff in error's motion to remand said cause to the Circuit Court of Greenup County, Kentucky.

III.

That said court erred in holding and deciding that under the law of Kentucky defendant in error, lessor railroad company, is not liable for the death of plaintiff in error's intestate through the negligence of the employes of its lessee in operating its train.

IV.

That said court erred in not holding and deciding that defendant in error, lessor railroad company, is liable for the death of her intestate through the negligence of the employes of its lessee in operating its trains.

V.

That said court erred in holding and deciding said cause to be removable, and in removing same from the Circuit Court of Greenup County, Kentucky.

Wherefore, the said Mariam McAllister as Administratrix of A. J. McAllister, deceased, prays that the judgment and order of the said District Court of the United States for the Eastern District of Kentucky, brought on error or appealed from herein, be reversed.

Allan D. Cole,
Counsel for Plaintiff in Error.

PETITION FOR ALLOWANCE OF WRIT OF ERROR OR APPEAL TO THE UNITED STATES SUPREME COURT DIRECT ON QUESTION OF JURISDICTION.

(Filed July 25, 1916.)

To the Honorable, the Justices of the Supreme Court of the United States, or any Associate Justice thereof, or to the Honorable A. M. J. Cochran, District Judge of the United States District Court for the Eastern District of Kentucky:

Your petitioner, Mariam McAllister as Administratrix of A. J. McAllister, deceased, respectfully represents that there is manifest error committed by the final judgment pronounced in this case on the 24th day of July, 1916, in and by which said final judgment this court assumed jurisdiction of the cause set forth in your petitioner's bill of complaint and undertook to and did render a final judgment therein to the exclusion of the Greenup Circuit Court, whereby said judgment became and is a bar to further proceedings in said court.

Wherefore, your petitioner considering herself aggrieved, prays an order granting a writ of error or appeal from said final judgment entered, as aforesaid, to the Supreme Court of the United States, as authorized by Section 5 of the Act of Congress of the United States, approved March 3, 1891, and prays this Honorable Court that said writ of error or appeal be allowed solely upon said question of jurisdiction, and that the transcript of so much of the record, proceedings, and papers upon which said judgment was made as may be necessary to present said question of jurisdiction on writ of error or appeal, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioner herewith files, and offers to file, her bond in the penal sum of $500, and asks that the same be approved, and that the writ of error or appeal be granted.

Allan D. Cole,
Counsel for Plaintiff.

Dated July 25th, 1916.

ORDER.

(Entered July 25th, A. D. 1916.)

The plaintiff's petition having been dismissed by a judgment of this court upon consideration solely of the question of this court's jurisdiction of the action; and the plaintiff having prayed a writ of error or appeal to the Supreme Court of the United States on said question of jurisdiction it is now ordered that the writ of error be allowed; and it is further ordered that so much of the record and proceedings and papers upon which said order and decree was made as are necessary to present the said question of jurisdiction, and no more, be included in the record on writ of error.

ORDER.

(Entered July 25th, A. D. 1916.)

Now, on this 25th day of July, 1916, there is presented to the Honorable A. J. M. Cochran, District Judge of the United States District Court for the Eastern District of Kentucky, a petition for a writ of error or appeal to the Supreme Court of the United States, a writ of error to the Supreme Court of the United States, a citation directed to said appellees, The Chesapeake & Ohio Railway Company and The Maysville & Big Sandy Railway Company, citing and admonishing them to appear in the Supreme Court of the United States of America not exceeding thirty days from and after the day the said citation bears date, and an assignment of errors; which said petition for writ of error is allowed; said citation signed, said assignment of errors filed, and the order of the District Judge filed approving the writ of error bond in the sum of $500.00 which said bond is also filed.

WRIT OF ERROR.
(Filed July 25, 1916.)

United States of America, ss:
The President of the United States of America to The Hon. A. M. J. Cochran, Judge of the District Court of the United States for the Eastern District of Kentucky, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said District Court, before you, between Mariam McAllister as Administratrix of A. J. McAllister, deceased, plaintiff, and The Chesapeake & Ohio Railway Company and The Maysville & Big Sandy Railway Company, defendants, a manifest error hath happened to the great damage of the said plaintiff, Mariam McAllister as Administratrix of A. J. McAllister, deceased, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington in the District of Columbia thirty days after date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States, this 25 day of July A. D., 1916, and of the Independence of the United States the 140th.

J. W. Menzies,
Clerk of the District Court of the United States for the Eastern District of Kentucky, at Catlettsburg.
By Jos. M. Spears,
D. C.

Allowed by
A. M. J. Cochran,
United States District Judge.
Aug. 17, 1916.

WRIT OF ERROR BOND.
(Filed July 25, 1916.)

Know All Men By These Presents:

That we, Mariam McAllister as Administratrix of A. J. McAllister, deceased, as principal, and A. D. Cole, as surety, are held and firmly bound unto the above named The Chesapeake & Ohio Railway Company and The Maysville & Big Sandy Railway Company in the penal sum of $500, to be paid to the said parties; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with out seals and dated the 25 day of July, in the Year of Our Lord, Nineteen Hundred and Sixteen.

Whereas, the above named Mariam McAllister as Administratrix of A. J. McAllister, deceased, has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the Judge of the District Court for the Eastern District of Kentucky;

Now, therefore, the condition of this obligation is such that if the above named Mariam McAllister as Administratrix of A. J. McAllister, deceased, shall prosecute said appeal to effect and answer all damages and costs if she shall fail to make said appeal good, then this obligation shall be void, otherwise, the same shall be and remain in full force and virtue.

Mariam McAllister as Administratrix
of A. J. McAllister, Deceased,
By A. D. Cole, Attorney.
A. D. Cole.

The foregoing bond is approved this 25 day of July, 1916.

A. M. J. Cochran,
District Judge.

CITATION.

United States of America, ss:
To The Chesapeake & Ohio Railway Company and The Maysville & Big Sandy Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern District of Kentucky for a final judgment signed, filed and entered on the 24th day of July, 1916, in that certain suit wherein Mariam McAllister as Administratrix of A. J. McAllister, deceased, is plaintiff and appellant or plaintiff in error, and you are defendants, and appellees or defendants in error, to show cause, if any there be, why the final judgment rendered against the said appellant or plaintiff in error, as in the said order allowing the writ of error or appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. M. J. Cochran, Judge of the District Court of the United States for the Eastern District of Kentucky, this 25th day of July, A. D. 1916, and of the Independence of the United States the 140th.

A. M. J. Cochran,
Judge of the District Court of the United States for the Eastern District of Kentucky.

Received copy and acknowledged service of the within citation this 31st day of July, 1916.

Worthington, Cochran & Browning,
Attorneys for Defendants in Error.

ORDER.

(Entered August 12th, A. D. 1916.)

It appearing to the court that the time allowed in which to prepare and file record in the Supreme Court of the United States in the above entitled cause will expire on August 23rd, 1916, it is now, upon motion of plaintiff, ordered and adjudged that the time in which to prepare and file record in the Supreme Court of the United States, be and the same is extended for the period of Sixty (60) days from August 23rd, 1916.

PRAECIPE AND ORDER.

(Filed July 25, 1916.)

The above named plaintiff having petitioned this court for writ of error from the order and judgment made in this cause on the 24th day of July, 1916, dismissing her petition on consideration of the question of jurisdiction only, and such writ of error, having, by order of this court, been granted on said question of jurisdiction alone, and the further order made therein that so much of the record and proceedings and papers upon which said decree was made as might be necessary to present the said question of jurisdiction, and no more, be included in the record on appeal:

Now, therefore, it is hereby ordered that the following pleadings, proceedings and documents on file in said cause be included in the record on appeal:

(1) The citation to be used herein requiring the defendants to appear in the Supreme Court of the United States on this appeal and proof of service thereof.

(2) The original petition and all the amendments thereto.

(3) The summons issued to the defendants and proof of its service.

(4) The petition of defendants for removal.

(5) The answer of plaintiff traversing the allegations thereof.

(6) The motion of plaintiff to remand and the order overruling same.

(7) The motion to reconsider said ruling and the order overruling same.

(8) Opinion of Cochran, District Judge, on motion to reconsider motion to remand.

(9) All minutes of the court and orders and judgments made in the case.

(10) All certificates made by the Clerk of this court with reference to the proceedings, rulings, and judgments of the court herein.

(11) The petition for writ of error, order of the court granting such writ of error, and the said writ allowed, the assignments of error of the plaintiff upon this writ of error, and the undertaking on writ of error, and all orders of the court and of the judge in Chambers relating thereto.

(12) The certificate of the Clerk of the correctness of the record on appeal in this cause.

(13) All orders of filings, and acknowledgment and proof of service of all papers mentioned above.

A. M. J. Cochran.

CLERK'S CERTIFICATE.

United State District Court,
Eastern District of Kentucky.

I, J. W. Menzies, Clerk of the United States District Court for the Eastern District of Kentucky, at Catlettsburg, do hereby certify that the foregoing .... pages contain a full, true and complete transcript of the record had herein, in the case of Mariam McAllister, Administratrix of the estate of A. J. McAllister, deceased, plaintiff in error, against The Chesapeake & Ohio Railway Company and The Maysville & Big Sandy Railway Company, defendants in error.

Witness my hand as Clerk, and seal of said Court at Catlettsburg, this 4th day of October, A. D. 1916, and of our Independence the 141st year.

J. W. Menzies,
Clerk United States District Court.
Chas. N. Wiard,
Deputy Clerk.

SUPREME COURT, U. S.
FILED
NOV 15 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1916

No. 748

Mariam McAllister, Administratrix of A. J. McAllister, Deceased, ... *Appellant,*

v.

The Chesapeake & Ohio Railway Company and the Maysville & Big Sandy Railroad Company, ... *Appellees.*

MOTION TO ADVANCE UNDER RULE SIX.

BRIEF FOR APPELLANT.

ALLAN D. COLE,
Counsel for Appellant.

W. T. COLE, Greenup, Ky.
H. W. COLE, Maysville, Ky.
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1916

No. 748

Mariam McAllister, Administratrix of A. J. McAllister, Deceased, ... *Appellant,*

v.

The Chesapeake & Ohio Railway Company and the Maysville & Big Sandy Railroad Company, ... *Appellees.*

MOTION TO ADVANCE UNDER RULE SIX.

Now comes the plaintiff in error, Mariam McAllister as Administratrix of A. J. McAllister, deceased, by her attorney of record herein, and moves this Honorable Court to advance the

above styled cause pursuant to Rule Six, because there is presented for consideration the sole question of the jurisdiction of the United States District Court for the Eastern District of Kentucky, as evidenced by the record and the brief on merits for appellant filed herewith.

ALLAN D. COLE,
Attorney for Plaintiff in Error.

NOTICE OF MOTION

The defendants in error are hereby notified that the plaintiff in error will on Monday, the 11th day of December, A. D. 1916, submit for the consideration of said court the foregoing motion and brief in support thereof hereto attached, all of which are herewith presented for your consideration.

ALLAN D. COLE,
Attorney for Plaintiff in Error

Copy of the foregoing notice and motion together with brief on the merits of the case received this 28th day of October, A. D. 1916.

WORTHINGTON, COCHRAN & BROWNING,
Attorneys for Defendants in Error.

BRIEF FOR APPELLANT.

May it Please the Court:

STATEMENT

On or about the 15th day of March, 1902, while A. J. McAllister was a traveler and passing at or near a public crossing in the town of Fullerton, Greenup County, Kentucky, and at a place where numerous people were accustomed to be and to travel, he was without fault on his part, and while in plain view of the appellees, their agents, servants and employes, then and there carelessly, negligently and wantonly run against and struck by a locomotive, engine and train of cars of the appellee, The Chesapeake & Ohio Railway Company, whereby said McAllister was so injured that shortly thereafter he died.

The decedent having been at the time of his death a citizen and resident of Greenup County, Kentucky, his widow, the appellant, a citizen and resident of Greenup County, Kentucky, was on the 26th day of March, 1902, by an order of the County Court of said county, appointed administratrix of his estate, and thereupon qualified and is now acting as such administratrix.

The Maysville & Big Sandy Railroad Company, a Kentucky corporation, owned the line of railway extending through the town of Fullerton in said county and state, which at all times herein mentioned it was operating by its agent the appellee, The Chesapeake & Ohio Railway Company, a Virginia corporation, under a lease or contract wherein the Kentucky corpora-

tion undertook to convey for a term of years, then unexpired, the said railway to the Virginia corporation; but which lease is and was ultra vires, null and void to the extent of relieving the Kentucky corporation from liability for certain torts committed by the Virginia corporation, its agents and servants.

The petition alleges that in the town of Fullerton, where numerous people were accustomed to be and to travel and at the time and place where decedent was struck, the Virginia corporation was operating its locomotive engine and train of cars at the excessive speed of fifty miles an hour; that no signal or warning of any kind was given of the approach of said locomotive, engine and cars to said place; and that appellees, their agents, servants and employes saw, or by the exercise of reasonable diligence could have seen, the decedent in time to have prevented his injury and death.

When process on the petition was served, the Virginia corporation filed in the Greenup Circuit Court a petition for removal, and upon the refusal of that court to order a removal, a transcript of the record was filed by it in the United States District Court for the Eastern District of Kentucky, wherein the Virginia corporation also obtained an order enjoining appellant from further prosecution of her suit in the Greenup Circuit Court. On appeal to the United States Circuit Court of Appeals, Sixth Circuit, the order granting this preliminary injunction was affirmed without any expression of opinion by that court on the question of removability, because at that time there had been no motion made to remand the case. McAllister v. C. & O. Ry. Co., 157 Fed. 740. Thereupon, the appellant entered a motion to remand the case, which was overruled, and thereafter entered another motion to reconsider the ruling.

which was likewise overruled. In connection with the latter order, Judge Cochran handed down an elaborate opinion embraced within pages 22 to 44 of the record. Nevertheless, the appellant still elected to stand upon her motion to remand and steadfastly refused to recognize the jurisdiction of the United States District Court for the Eastern District of Kentucky, or to proceed with the prosecution of her cause therein. Whereupon the court on July 24, 1916, on motion of defendants, dismissed her cause, and adjudged that she take nothing by her suit and that the defendants go hence without day and with costs.

Thereafter, to-wit, on July 25, 1916, the court entered the following order:

> "The plaintiff's petition having been dismissed by a judgment of this court upon consideration solely of the question of this court's jurisdiction of the action; and the plaintiff having prayed a writ of error or appeal to the Supreme Court of the United States on said question of jurisdiction, it is now ordered that the writ of error be allowed; and it is further ordered that so much of the record and proceedings and papers upon which said order and decree was made as are necessary to present the question of jurisdiction, and no more, be included in the record on writ of error."

Therefore, the sole question presented to this court is whether the United States District Court for the Eastern District of Kentucky committed error in refusing to sustain appellant's motion to remand her cause to the Greenup Circuit Court.

ASSIGNMENT OF ERRORS

Now comes the above named plaintiff in error, Mariam McAllister as Administratrix of A. J. McAllister, deceased, by

Allan D. Cole, her attorney, and says that in the record and proceedings in the above entitled matter there is manifest error in this, to-wit:

I.

That the United States District Court for the Eastern District of Kentucky erred in holding and deciding that the said court had jurisdiction to try and determine said suit, and in rendering its judgment dismissing plaintiff in error's petition therein on that ground.

II.

That said court erred in overruling plaintiff in error's motion to remand said cause to the Circuit Court of Greenup County, Kentucky.

III.

That said court erred in holding and deciding that under the law of Kentucky defendant in error, lessor railroad company, is not liable for the death of plaintiff in error's intestate through the negligence of the employes of its lessee in operating its train.

IV.

That said court erred in not holding and deciding that defendant in error, lessor railroad company, is liable for the death of her intestate through the negligence of the employes of its lessee in operating its trains.

V.

That said court erred in holding and deciding said cause to be removable, and in removing same from the Circuit Court of Greenup County, Kentucky.

Wherefore, the said Mariam McAllister as Administratrix of A. J. McAllister, deceased, prays that the judgment and order

of the said District Court of the United States for the Eastern District of Kentucky, brought on error or appealed from herein be reversed.

ARGUMENT

I.—JURISDICTION

A.—Trespasser.

The process of reasoning whereby the lower court concluded to retain jurisdiction of the case is, first, that as the place in the town of Fullerton at which plaintiff was struck was alleged to be "at or near a public crossing," the allegation must be construed to mean that he was killed near a public crossing and was, therefore, a trespasser: and, second, that in view of the allegation that the "employes saw or by the exercise of reasonable diligence could have seen" the decedent in time to prevent the injury, such allegation must be construed to mean that the Virginia corporation was guilty of negligence only in failing to exercise ordinary care to keep a lookout for decedent.

But, as the Virginia corporation owed no lookout duty to a trespasser, the conclusion was reached by the lower court that no cause of action was stated against the lessee, the Virginia corporation, and, consequently, none against the lessor, the Kentucky corporation. Having reached this conclusion, it is submitted that, it was the duty of the lower court to say as in Evans v. Felton, 96 Fed. 176, wherein it was said:

> "Defendant's contention in support of the proposition that the controversy herein is severable as to him is that the declaration fails to state a cause of action as against him, while it does state a good cause of action as

against the other defendant. The declaration charges that the two defendants jointly committed the sort. It is admitted that, *if the averments of fact were sufficient to support this charge*, the cause would not be severable. Railroad Company v. Wangelin, 132 U. S. 599. I hold that, under the facts in this case, where the declaration *in form* charges a joint tort against two or more defendants, *the question of whether or not the declaration states facts sufficient to establish a good cause of action against either of the defendants is one for the determination of the State court. The cause is remanded*," or as in Enos v. Ky. Distilleries & Warehouse Co., 189 Fed. 346, (Sixth Circuit) wherein it is said:

"But the rule which permits a removal to the Federal Court in case of a fraudulent joinder of defendants whose presence destroys diversity of citizenship cannot be carried to the extent of permitting such fraudulent joinder to be inferred from the fact only *that no cause of action is found to exist against any defendant, resident or non-resident.*"

But apparently unwilling to accept the logic of its position, the lower court proceeded to create a man of straw only for destruction, and assumed, contrary to the case of King v. Creekmore, 117 Ky. 172, cited and relied upon in the opinion, that a cause of action is stated against the lessee, Virginia corporation, merely for failing to exercise ordinary care to avoid striking decedent *after his presence was discovered;* and then laboriously argued that the Kentucky Court of Appeals has never held that a lessor corporation is liable for the tort of a lessee corporation for failing to exercise ordinary care towards a trespasser, and that, therefore, the Kentucky corporation not being liable in the case at bar, a separable controversy exists.

Now do the cases of McCabe's Admr. v. M. & B. R. R. Co., 112 Ky. 861, and Ill. Cent. R. R. Co. v. Sheegog, 126 Ky. 252, support the conclusion reached by the lower court in the case assumed contrary to the pleadings? To bring the case at bar within the McCabe and Sheegog cases, it will only be necessary for this court to determine whether or not the decedent, if a trespasser, was a member of the public. Appellant's contention is that the rule in the McCabe case as explained in the Sheegog case, which was affirmed by this court in 215 U. S. 308, and approved in the Willard case in 220 U. S. 413, imposed a liability upon the lessor company in *all* cases for the torts of its lessee, except where the relation of employer and employee exists and an injury results to the employee from the negligent operation of its trains and the general management of the leased property; and, further, that it does not even except the case of an employee, if the lessee company also fails in any duty to him as a "member of the public." For Sheegog recovered, *though an employee*, on the ground that the lessee company failed in its duty to him as a "member of the public," Mr. Justice Holmes saying:

> "*The plaintiff recovered for a breach of duty to the public which at best was not released or limited by his intestate's having been in the company's service.* . . . . . The court, however, then goes on to refer to the distinction taken in a later Kentucky case between conditions arising from negligent operation and those resulting from the omission of such duties as the proper construction and maintenance of the road. . . . (Swice v. M. & B. S. R. R. Co., 116 Ky. 263.) And quotes with seeming approval, decisions in other cases, limiting the liability of the lessor to the latter case. *But it then proceeds to show that the recovery in this case is upon a breach of duty to the public.*"

If, therefore, appellant's intestate is not within the qualified exception, he is of necessity within the rule. But he cannot possibly be within the qualified exception, because he was not an *employee*. Therefore, unlike an employee, his status, as a member of the public, was not affected by any contract of employment, which as an only ground of liability would exclude him from relief against the lessor for a tort of the lessee company resulting simply from the negligent operation and management of the leased property.

Now, if an employee may not recover against the lessor for the lessee's breach of contractual obligation to him, but may recover against the lessor upon an entirely distinct ground, namely, that the lessee has failed in the performance of its duty to him as "one of the public", why has not a supposed trespasser a joint cause of action as "one of the public" against both the lessor and the lessee for the alleged failure of the lessee's servants to exercise ordinary care to avoid striking him after his presence on the track was discovered? That he has such joint cause of action under the Kentucky law, it is submitted, is supported by the decisions cited, supra, if not expressly, at least by necessary implication.

In the case of Willard v. C. B. & Q. Ry. Co., 165 Fed. 163, affirmed in 220 U. S. 413, it is said:

> "That the general doctrine is otherwise—that joint recovery against a lessor, under the conditions stated in the petition, is denied in the Federal courts, by numerous authorities cited in opposition—cannot debar the plaintiff of his right of action (and such benefit as the local rule may afford) in the State court, nor authorize a removal of his suit under the Federal Statutes, as above construed by the ultimate tribunal."

Hence, even upon the theory indulged by the lower court

that decedent was a trespasser, it follows that not a separable controversy, but a joint cause of action exists, and, therefore, the motion to remand should have been sustained.

LICENSEE

The conclusion of the lower court that decedent was a trespasser seems to have resulted from misapplying Davis v. C. & O. Ry. Co., 116 Ky. 144, a country private crossing case, and in failing to consider the express allegation of the petition,—if it be construed that decedent was not on a public crossing when he was struck but near it,—that he was nevertheless at a place in the town of Fullerton where numerous persons were accustomed to be and to travel and was, therefore, a licensee. For in the case of C. & O. Ry. Co. v. Warnock's Admr., 150 Ky. 76, it is said:

> "Fred Warnock, a young man thirty-two years old, was employed in Warnock Brothers general merchandise store, in Fullerton, a town of some 500 inhabitants or more in Greenup County. The store faced Ferry Street on the east side of the railroad track while the railroad platform faced Ferry Street on the western or opposite side of the railroad track.....Appellant's first ground for reversal is, that Warnock having been injured upon appellant's private right of way, in an unincorporated community, *he was a trespasser*, and the appellant owed him no duty except to use ordinary care to avoid injuring him after the discovery of his peril, and that it did exercise such care in this instance. This defense is based upon the idea that the duty which appellant owed Warnock was fixed by the fact that Fullerton was an unincorporated town and that the rule applicable to trains *running through country districts* applied in Fullerton because it was an unincorporated town. This is a misconception of the rule fixing the

reciprocal rights of the parties, which has become well established in this state. In L. & N. R. R. Co. v. McNary's Admr., 128 Ky. 414, and after a full examination of the authorities upon this question, we announced the following general rule: 'This court has laid down in a long line of opinions that the railroad company ordinarily owes no duty to a trespasser until his peril is discovered, and that it is not liable for an injury to him, unless after his peril is discovered the injury to him may be avoided with proper care. *This rule has been applied in all cases where the injury occurred in the country*.....C. & O. Ry. Co. v. See's Admr., 79 S. W. 252, and cases cited.

'*On the other hand, in cities and towns where the population is dense, and the from the number of persons passing the danger to life is great, a different rule applies; and in such localities it is the duty of those operating railroad trains to moderate the speed of the train, to give notice of its approach, to keep a lookout and take such precaution as the circumstances demand for the proper security of human life.*'

It is apparent, therefore, that appellant's duty to appellee was not to be regulated by the fact that Fullerton was, or was not, an incorporated town, but by the facts of the case which bring it within the *second clause* of the rule as above announced in the McNary case. Although Fullerton was not an incorporated town, it was a town in fact; and the place where the accident occurred was such a locality that the presence of persons on the track might be anticipated at any time.''

To the same effect is C., N. O. & T. P. Ry. Co. v. Dickerson's Admr., 102 Ky. 560; Carter's Admr. v. C. & O. Ry Co., 150 Ky. 525; Corder's Admr. v. C., N. O. & T. P. Ry. Co., 155 Ky. 536; C. & O. Ry. Co. v. Blankenship, 157 Ky. 699; C. & O. Ry. Co. v. Dawson's Admr., 159 Ky. 296; L. & N. R. R. Co. v. Johnson's

Admx., 161 Ky. 832; McKnight's Admr. v. L. & N. R. R. Co., 168 Ky. 90; C., St. L. & N. O. R. R. Co. v. Armstrong's Admr., 168 Ky. 108.

Referring to the McCabe, Swice, and Sheegog cases, Judge Cochran on page 27 of the record says:

> "It is to be gathered from these three cases that the distinction between those cases where the lessor is liable and those where it is not, is this: If the cause of the injury was the omission of a public duty, i. e. *of a duty owed the public generally, then the lessor is liable;* but if not, and it was the omission simply of a duty owed the person injured growing out of the particular relation between him and the lessee, then the lessor is not liable notwithstanding he may be said to be a member of the public."

If, therefore, decedent was a licensee at the time and place where struck, then, although it does not appear why a trespasser is not as much a "member of the public" as a licensee, nevertheless, even according to the lower court's construction of the Kentucky law, the failure of the agents and servants of the lessee, the Virginia corporation, to keep a lookout, moderate the speed of its train and give notice of its approach, as alleged in the petition, was an omission of duties which it owed decedent in common with the "public generally", and such failure to perform any or all of these duties necessarily imposed upon the lessor, the Kentucky corporation, an equal and joint liability for the injury resulting from such negligence. Consequently, the liability of the lessor and lessee corporations being joint, no separable controversy exists; and the cause should have been remanded nearly fifteen long, weary years ago. So, once again it becomes the duty of this court, as said in Kentucky v. Powers, 201 U. S. 135, to "see to it that they (the subordinate

courts) do not *usurp authority not affirmatively given to them by acts of Congress.*"

For the foregoing reasons, it is earnestly insisted that the judgment appealed from is erroneous and should be reversed, with directions to remand the cause to the Greenup Circuit Court.

Respectfully submitted,

ALLAN D. COLE,
Counsel for Appellant.

W. T. Cole, Greenup, Ky.,
H. W. Cole, Maysville, Ky.,
of Counsel.

FILED
DEC 11 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1916

No. 748

Mariam McAllister, Administratrix of
A. J. McAllister, Deceased,.....*Plaintiff in Error,*

v.

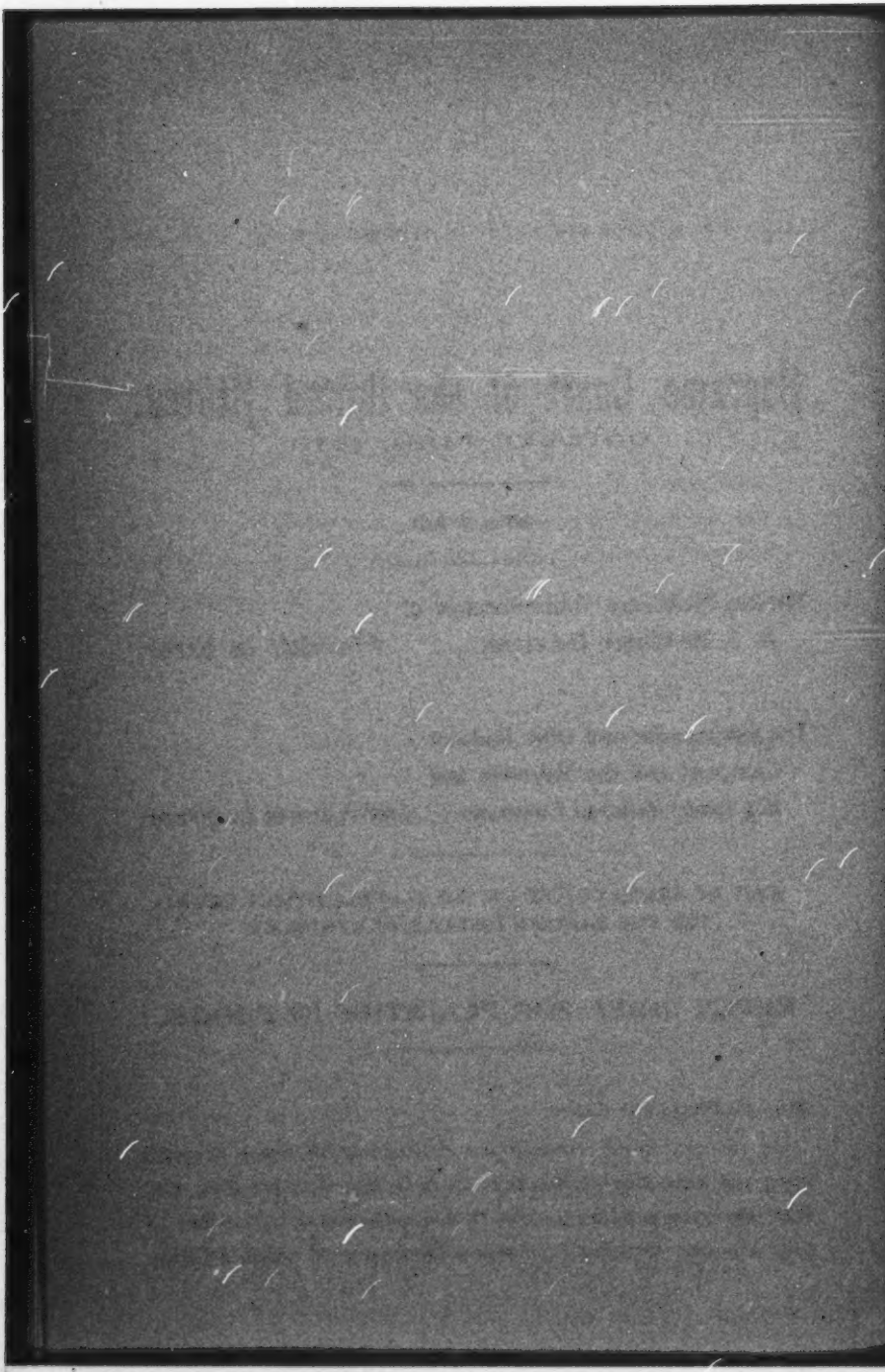
The Chesapeake and Ohio Railway
Company and the Maysville and
Big Sandy Railroad Company,...*Defendants in Error.*

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

ALLAN D. COLE,
Counsel for Plaintiff in Error.

W. T. COLE, Greenup, Ky.
H. W. COLE, Maysville, Ky.
Of Counsel.



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The Chesapeake and Ohio Railway
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Big Sandy Railroad Company,...*Defendants in Error.*

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

May It Please the Court:

On the one hand, counsel for defendants in error contend upon the authority of Davis v. C. & O. Ry. Co., 116 Ky., 156, that since the petition alleges that decedent was killed "at or near a public crossing", he was a trespasser to whom no duty

was owed, except to exercise ordinary care towards him after his peril was discovered.

They also contend upon the authority of King v. Creekmore, 117 Ky., 172, that the allegation of the petition, that those in charge of the train "saw or by the exercise of reasonable diligence could have seen the decedent in time to avoid striking him" is equivalent to the allegation that they did *not* see him in time to prevent the accident. But they refuse to accept the necessary conclusion that the petition, as thus construed, states no cause of action against either of the defendants in error, and ask this court to do likewise.

Now, when the Greenup Circuit Court refused to remove the suit to the United States Circuit Court for the Eastern District of Kentucky and thereupon the non-resident defendant in error filed a transcript of the record therein, that court was at once called on to determine for itself whether or not under the removal statute a suit was presented to it in which a separable controversy existed; and in construing said statute, it held, in the face of Enos v. Kentucky Distilleries & Warehouse Company, 189 Fed. 346, (Sixth Circuit) that, although no cause of action is stated against either the resident or the non-resident corporation, it is nevertheless given jurisdiction by said Act of Congress to effect a removal and try the case. But how can there possibly be a separable controversy therein if the petition states no cause of action against either of the defendants in error? For, in the case of Smith v. Adams, 130 U. S. 173, it is said:

> "Whenever the claim or contention of a party takes such form that a judicial power is capable of acting upon it, *then* it has become a case or controversy."

In the case of LaAbra Silver Mining Company v. United States, 75 U. S. 455, it is said:

> "If the question cannot be brought into a court, *then there is no case* in law or equity, *and no jurisdiction is given by the words of the article.* Cohen v. Virginia, 6 Wheat 264. In the same case, Chief Justice Marshall declared a suit to be the prosecution by a party of some claim, demand or request in a court of justice for the purpose of being put in possession of a *right* claimed by him and of which he was deprived."

Now, according to the contention of opposing counsel, the petition in the case at bar affirmatively shows that plaintiff in error has no *right* to compensation for his death, because it fails to allege the breach of any duty owing by the non-resident corporation to decedent. Hence, in the absence of a "controversy" in the face of the express language of the Removal Act, the lower court erred in assuming jurisdiction and in refusing to remove the suit to the Greenup Circuit Court.

On the other hand counsel for plaintiff in error contend that under the allegation of the petition, that decedent was killed at a place where numerous people were accustomed to be and to travel, he was not a trespasser but a licensee, to whom, as well as to the *public generally*, the non-resident corporation owed the duties, as alleged, of lookout, warning, reasonable speed and train control; and that, therefore, the petition states a joint cause of action against both of the defendants in error.

Now, the attempt of opposing counsel to obliterate the distinction between a trespasser and a licensee evidenced by different duties imposed is not supported by the decisions of the Kentucky Court of Appeals; for in the case of Willis's Admr.. v. L. & N. R. Co., 164 Ky., 124, it is said:

"Running through all these opinions will be found the thought that it is the habitual use of the track by large numbers of persons rather than the location of the track, that creates the distinction between *trespassers and licensees* .....It should also be noticed that in the Corder, Warnock, Carter and Blankenship cases the accidents considered by the court occurred at or near a railroad station, or in the limits of a city, and also at places where large numbers of persons habitually used the track."

Neither the case of L. & N. R. Co. v. Marlow, 169 Ky., 140, nor the case of Watson's Admr. v. C. & O. Ry. Co., 170 Ky., 252, cited by opposing counsel, militates against this doctrine; but both of them support it. For example, in the latter case it is said:

"*If she was not a licensee upon the track, then she was, in law, a trespasser*, and appellees owed her no duty except to exercise ordinary care for her safety after having discovered her presence upon the tracks."

Moreover, distinguishing between the admitted facts in the case at bar and the facts in the Watson case, whereby the former is brought within the rule in the Warnock case, we further quote from the Watson case as follows:

"In the case at bar, at the place upon the tracks where decedent was unfortunately killed, and where she was proceeding to go, there was no street upon either side of the railroad tracks; the right of way was enclosed by wire fences on either side from the crossing at Harrison Street: cattle guards were placed across the tracks with signs extending to the fences upon either side; the railroad tracks from the cattle guards to the distance of 1200 feet were constructed upon a field; there were not any houses upon either side of the right of way which had a front

thereon; the dwellings between the right of way and the county road, and which were few in number, all fronted to the side streets and county road, and no necessity existed for their occupants using the railroad tracks to go into Fullerton or to any other place; there were not any roads, side-walks, or *places for travel* existing upon the right of way to the east of Harrison Street anywhere. The enclosure of the right of way with fences and the cattle guard was all the railroad company could be expected to do to keep persons from using the tracks, and there was an entire absence of any necessity for traveling upon the tracks or any invitation to do so. Under these circumstances, it does not seem reasonable to require the employes of the railroad to anticipate the presence of persons upon the track, who, to get to it from the south of the right of way, must turn aside from their streets and roads and climb over or go through the fences, and for the limited number of persons at Morten's Addition who live three-fourths of a mile away, and who use the track simply for their pleasure of convenience. *Under these circumstances*, it cannot be said that the railroad company, acquiesced in the use of its track, as a walking way, *anywhere to the east of Harrison Street.*"

Therefore, persons traveling west of Harrison Street were not trespassers but licensees as was decedent herein.

Pursuant to the well settled rule followed by the Court of Appeals of Kentucky in the Warnock and other cases cited herein and in my former brief, the Greenup Circuit Court refused to transfer the case at bar to the United States Circuit Court for the Eastern District of Kentucky; and in as much as the non-resident defendant in error refused to appeal from that decision and by injunction prevented the trial of the case in the Greenup Circuit Court, the decision of the Greenup Circuit

Court is final and should be treated as the law of this case, as much so as if within the two years allowed to take an appeal the Court of Appeals of Kentucky had on appeal affirmed that decision. Consequently, if this case were here on writ of error to the Court of Appeals of Kentucky, the decision of the Greenup Circuit Court would be accepted as final and binding as a similar decision was in the case of C. & O. Ry. Co. v. McDonald, 214 U. S. 194, wherein it is said:

> "The Kentucky Civil Code of Practice provides that an appeal from judgments, final orders, which includes such orders as the one now under consideration (Hall v. Ricketts, 9 Bush, 336, 370), shall not be granted except within two years after the right of appeal first accrued. No appeal was taken from the order refusing to remove within two years. At the time when the appeal in the present case was made to the Kentucky Court of Appeals, it was too late to review the order refusing to remove. In the case of Maysville & B. S. R. R. Co. v. Willis, 31 Ky., L. Rep. 1249, 1252, the Court of Appeals of Kentucky, dealing with the question said:
>
> "It is further insisted that it was error not to grant the request of appellee to remove the action to the Federal Court. This motion was based upon the ground that the original petition did not state a good cause of action against either the Chesapeake & Ohio Railway Company, which is a foreign corporation, or the resident defendant, The Maysville & Big Sandy Railroad Company. The action of the lower court in refusing to transfer the case was made and entered in July, 1903, and it is now too late to raise any question as to the regularity of this ruling."

Why, then, should not the final and unreversed judgment of the Greenup Circuit Court, rendered pursuant to the well settled rule in Kentucky, become the law of this case the same

as if affirmed by the Court of Appeals of Kentucky on the question of fraudulent joinder, and thus entitle plaintiff in error to come within the rule stated in Chicago R. Co. v. Whitaker, 239 U. S., 431? In as much then as a licensee is a member of the public within the meaning of the McCabe case, it follows that the resident defendant in error could not by contract absolve itself from the corresponding duties, and, therefore, it is liable for the failure of the non-resident defendant in error to perform the duties alleged in the petition. Hence, a joint cause of action existing, the lower court had no jurisdiction and should have remanded the case to the Greenup Circuit Court.

But, the petition to the contrary notwithstanding, opposing counsel endeavor to escape the horns of a dilemma by the bald assumption, on page 6 of their brief, that the petition alleges that those in charge of the train of the non-resident defendant in error *saw* decedent's peril in time to have prevented his death and, therefore, states a cause of action against it; but not against the resident defendant in error, upon the ground, stated on page 7 of their brief, that those in charge of said train did *not see* decedent's peril in time to have prevented his death, and that the Court of Appeals of Kentucky has never "squarely decided" that a lessor railroad company is liable for the torts of its lessor against a trespasser. Diligent research, however, would have enabled learned counsel to make some interesting discoveries. For example, in the case of Davis v. C. & O. Ry. Co., 116 Ky., 152, it is said:

> "*After* the petition for removal had been filed, the appellant tendered an amended petition, making the Maysville & Big Sandy Railroad Company, a domestic corporation and appellee's lessor, a defendant. *It came too late*

to prevent a removal of the case. *Therefore*, it was not within the rule of the McCabe case, 112 Ky., 861, and Pierson v. Ill. Cent. R. R. Co. (C. C.) 118 Fed. 342."

In the case of O'Bannion's Admr. v. Southern Railway Company in Kentucky, 110 S. W. 329, it is said:

"While going down a heavy grade, at a point two miles from Midway, and about 100 feet from a private farm crossing, it ran over and killed appellant's intestate, a little girl slightly over two years of age.....The appellee railroad corporation having licensed the Cincinnati, New Orleans & Texas Pacific Railway Company to run its cars over its line, it is as responsible for whatever accident took place in the operation of the train as if it had been one of its own, and, therefore, so far as the responsibility of the appellee for the injury involved here is concerned, *we will treat the case as if the accident was occasioned by one of its own trains.* McCabe's Admx. v. Maysville & B. S.R. R. Co., 112 Ky., 861; Louisville & Nashville R. R. Co. v. Breeden's Admr., 111 Ky., 729.

The little child killed by the accident above detailed was a *trespasser upon the track of appellee*, and therefore its employes in charge of the train which caused the injury owed her no duty except to use reasonable diligence, after her peril was discovered to prevent the accident."

In the case of Plummer v. C. & O. Ry. Co., 143 Ky., 104, it is said:

"On the other hand, if the compliance with Section 841 of the Kentucky Statutes was not sufficient to authorize the Chesapeake & Ohio Railway Company to purchase, own and operate the railway, and to enable the Kentucky corporation to divest itself of title by conveyance, then the Chesapeake & Ohio Railway Company of Kentucky was *jointly and severally* liable with it as it sustained at the

time of the injury the relation *lessor* to the Chesapeake & Ohio Railway Company, and *consequently was responsible to persons not employes of the operating company for injuries sustained by them on account of the negligence of the operating company.* McCabe's Admx. v. Maysville & B. S. R. R. Co., 112 Ky., 861; Ill. Cent. R. Co. v. Sheegog's Admr., 126 Ky., 252."

In the case of Louisville Bridge Company v. Sieber, 157 Ky., 152, it is said:

> "The railroad train, though belonging to the Illinois Central Railroad Company, was operated on this track under the franchise of the Bridge Company which owned the track. Section 203 of the Constitution provides:
>
> 'No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereon from the liabilities of the lessor or grantor, lessee or grantee contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges.'
>
> Under this provision we have held, in cases like this, that the corporation owning the railroad is *responsible to the public* for the wrongs done by its lessee in operating it. McCabe v. Maysville, etc. R. R. Co., 112 Ky., 861; I. C. R. R. Co. v. Sheegog, 126 Ky., 252. Although Sieber was on the train unlawfully, *and was a trespasser upon it*, the railroad company had no right wantonly to injure him. .....We, therefore, conclude that the Circuit Court properly refused to instruct the jury peremptorily to find for the defendants."

Hence, if we indulge the assumption that decedent was a trespasser and that the petition states a cause of action against the non-resident defendant in error for its failure to discharge a duty owing to a trespasser, it follows that it states a cause against the resident defendant in error also; and, therefore,

a joint cause of action existing, the lower court was without jurisdiction and should have remanded the case to the Greenup Circuit Court.

For the foregoing reasons, it is earnestly insisted that the judgment of the lower court is erroneous and should be reversed.

Respectfully submitted,



Counsel for Plaintiff in Error.

W. T. COLE, Greenup, Ky.
H. W. COLE, Maysville, Ky.
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1916

No. 748

Miriam McAllister, Administratrix of A. J. McAllister, Deceased, ... *Plaintiff in Error,*

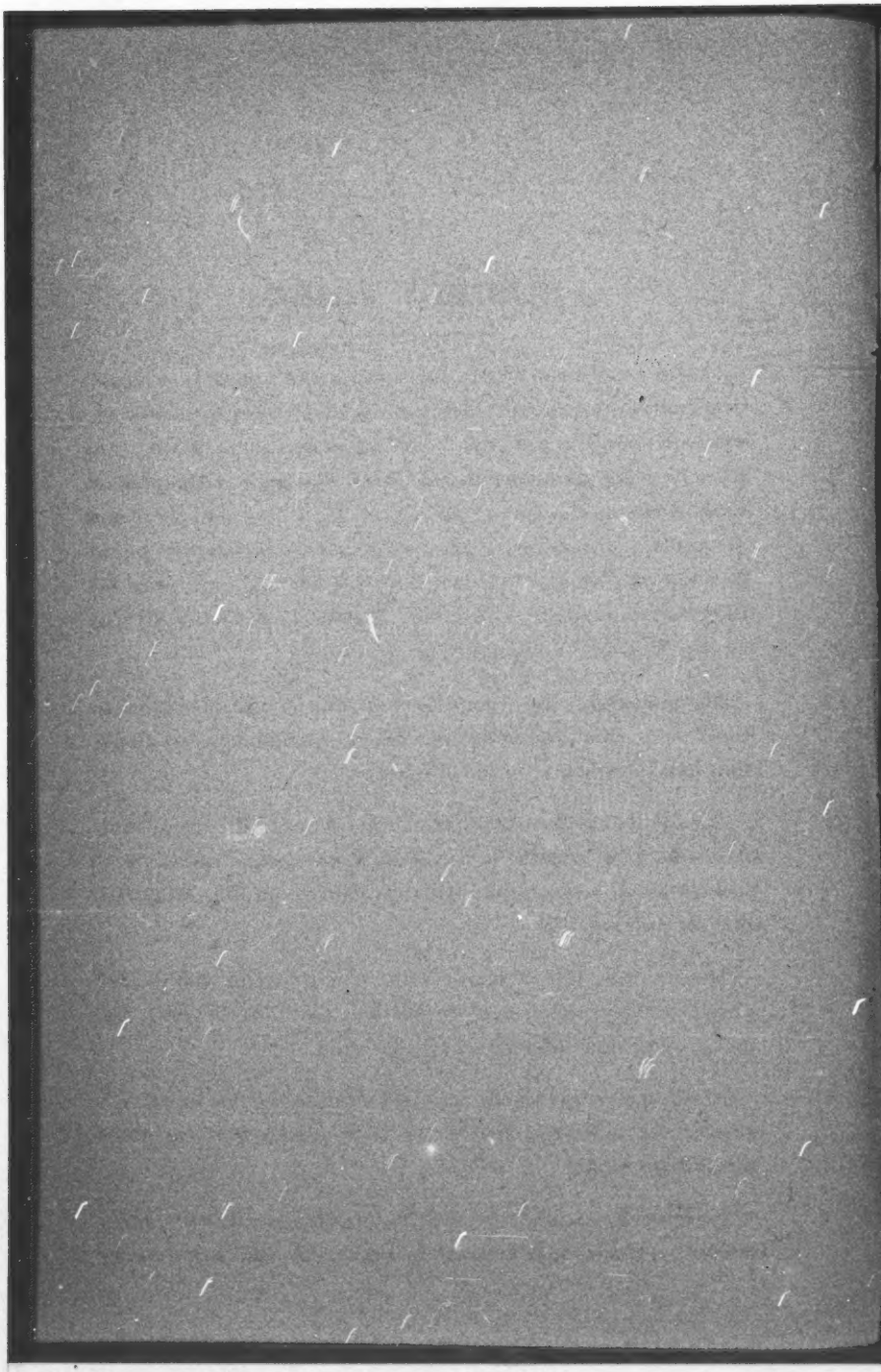
v.

The Chesapeake & Ohio Railway Company and the Maysville & Big Sandy Railroad Company, ... *Defendants in Error.*

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANTS IN ERROR.

E. L. WORTHINGTON,
W. D. COCHRAN,
LeWRIGHT BROWNING,
PROCTOR K. MAHLIN,
Counsel for Defendants in Error.



SUBJECT INDEX

This is a suit against a resident lessor and non-resident lessee of a railroad for death caused by the alleged negligence of the lessee in operating the train. The allegation that the lease was *ultra vires* is a mere conclusion of law. *Murray* v. *Chesapeake & Ohio Railway Company, 139 Ky., 379.* Moreover, the Court of Appeals of Kentucky had in less than five months before this suit was brought decided that this identical lease was not *ultra vires*, but legal and valid. *McCabe* v. *Maysville & Big Sandy Railroad Company, 112 Ky., 861.*

The allegation that when decedent was struck and killed he was "at or near" a public crossing, is equivalent to an allegation that he was *not* on the crossing.

The allegation that those in charge of the train "saw or by the exercise of reasonable care could have seen" decedent in time to avoid striking him, is equivalent to an allegation that they did *not* see him.

The petition affirmatively shows that decedent was a trespasser on the track when struck, and therefore no duty was owed to him until his peril was discovered.

The proper construction of a pleading in a state court is a question to be determined by the courts of the state in which the suit is brought.

When a non-resident is sued for his own negligence, and a resident is joined as defendant whom it is claimed is also liable

for the damages caused by the non-resident's negligence, but the petition shows on its face that he is not liable, the question whether there is in the suit a controversy wholly between citizens of different states, is a question on which the decisions of the highest court of the state are conclusive.

Under the law of Kentucky when a suit is brought against two defendants, one of whom is a non-resident, who committed the wrongful act, and no cause of action is stated against the resident defendant, the allegations as to him must be treated as *surplusage*.

The petition of plaintiff in error shows affirmatively that decedent was a trespasser, and under the law of Kentucky it states no cause of action against the resident defendant, the Maysville & Big Sandy Railroad Company, even if it be conceded that a cause of action is stated against the non-resident lessee. On the contrary it shows affirmatively that plaintiff in error had no right of action against the lessee for the death of decedent.

The cases in which, under the law of Kentucky there is a liability on the lessor of a railroad for a tort committed by its lessee, are where duties to the public are put on the lessor by its charter. Members of the public to whom such duties are put on the lessor company by its charter are *shippers*, *passengers* and *highway travelers*.

A trespasser is not a member of the traveling public, and the only duty owed to him is not to wantonly injure him after his peril is discovered, or should have been discovered, by those operating the road.

Conceding, for the sake of the argument, that the law of

Kentucky is not binding on the federal courts on the question whether or not there is in such a suit as the present a controversy wholly between the citizens of different states, because no cause of action is stated against the resident defendant, the decisions of the federal courts are unanimous that there is such a controversy, and the suit is therefore removable.

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Supreme Court of the United States.

OCTOBER TERM, 1918

No. 748

Miriam McAllister, Administratrix of A. J. McAllister, Deceased,.....*Plaintiff in Error,*

v.

The Chesapeake & Ohio Railway Company and the Maysville & Big Sandy Railroad Company,.....*Defendants in Error.*

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANTS IN ERROR.

May It Please the Court:

On March 26, 1902, plaintiff in error brought this suit, in the Circuit Court, of Greenup County, Kentucky, against the defendants in error, to recover damages for the death of her

intestate, caused, as alleged, by the negligence of the employes of defendant in error, The Chesapeake and Ohio Railway Company. The Chesapeake and Ohio Railway Company, in proper time, duly filed in the Greenup Circuit Court, its petition to remove the cause to the United States Circuit Court for the Eastern District of Kentucky. The transcript was duly filed in the Federal Court, and thereafter a motion to remand was made in said Court, which was overruled. The case still continued on the docket in that court, and afterwards plaintiff in error moved to reconsider the order refusing to remand. On May 22, 1912, the United States Court overruled said motion and filed an elaborate opinion thereon, which is copied on pages 22 to 43, inclusive, of the printed transcript. The case continued on the docket of that court without any steps being taken therein, except orders of continuance, until July 24, 1916. On that date, plaintiff in error refused to proceed with the prosecution of the case, or to recognize the jurisdiction of that court, and elected to stand upon her motion to remand, and thereupon the court rendered the judgment dismissing the petition, copied on page 47 of the transcript, to which this writ of error is taken.

The only question involved on this writ of error is whether the suit was removable; or, to state the question differently,—was there in the suit a controversy wholly between plaintiff in error, a citizen of Kentucky, and The Chesapeake and Ohio Railway Company, a citizen of Virginia.

The petition of plaintiff in error, in substance, alleged that at the time of the accident the road had been leased by defendant in error, the Maysville & Big Sandy Railroad Company, which owned it, to the defendant in error, The Chesapeake &

Ohio Railway Company, and that this latter company was operating it. It alleges that the employes of the lessee company ran the train at a high rate of speed, and failed to keep a lookout for persons on the track, or to give any warning of its approach; that decedent was "at or near" a public crossing and that they, (the employes of the lessee), "saw, or by the exercise of reasonable diligence could have seen" decedent in time to prevent striking him.

This is a plain suit against the lessor and lessee of a railroad for alleged negligence of the lessee and its employes in operating the train. There is no charge of any defect in the track or the train. The only alleged wrongful act charged against the lessor is that it had leased its road to the lessee, and that this lease was *ultra vires*, null and void. This allegation is a mere conclusion of law, and amounts to nothing. This exact point was expressly decided by the Kentucky Court of Appeals, as to this identical lease, in *Murray* v. *Chesapeake & Ohio Railway Company, 139 Ky., 379.* Furthermore, on March 5, 1902, nearly five months prior to the bringing of this suit, the Kentucky Court of Appeals had decided in *McCabe* v. *Maysville & Big Sandy Railroad Company, 118 Ky., 861,* that that lease was *not ultra vires*, but was expressly authorized by an Act of the Legislature of Kentucky. Plaintiff in error is conclusively presumed to know the law, and she knew when she made that allegation that it was not true. It was, therefore, a fraudulent allegation, as charged in the petition for removal.

The only questions left for decision are:

Does the petition of plaintiff in error state any cause of action against the resident defendant, the lessor?

2. If so, does this fact entitle the non-resident defendant to a removal?

The petition alleged that when decedent was struck and killed, he was "at or near" a public crossing. This is equivalent to an affirmative allegation that he was *not* on a public crossing. That such is the proper construction of such an allegation was expressly decided by the Court of Appeals of Kentucky in *Davis* v. *Chesapeake & Ohio Railway Company, 116 Ky., 166.*

The petition alleges that those in charge of the train "saw or by the exercise of reasonable diligence could have seen the decedent in time to avoid striking him." This is equivalent to an allegation that they did not see him in time to prevent the accident. That this is the proper construction of such an allegation was expressly decided by the Court of Appeals of Kentucky in *King* v. *Creekmore, 117 Ky., 172.*

It results, therefore, that the petition of plaintiff in error *affirmatively* shows that the decedent was a *trespasser* on the track when he was killed. He was not a highway traveler. He was not an employe of either of the defendants in error. He was not a passenger. He was not invited, expressly or impliedly, to be on the railroad track. He was not going to the depot to transact any business with either of the defendants in error.

Should it be held that the allegations of the petition that the place of the accident was where numerous people were accustomed to be and travel brings this case within the rule laid down in *Chesapeake & Ohio Railway Company* v. *Warnock, 150 Ky.,74,* requiring those operating trains under such condi-

tions to slacken speed and keep a lookout for persons on the track, that would not alter the fact that decedent was, under repeated decisions of the Court of Appeals of Kentucky, a trespasser. *Louisville & Nashville R. Co.* v. *Marlow, 169 Ky., 140; Cincinnati, &c., Ry. Co.* v. *Harrigan, 149 Ky., 61.* If the rule laid down in *Chesapeake & Ohio Railway Company* v. *Watson, 170 Ky., 254,* applies, then no duty was owed to decedent until his peril was discovered. That case involved an accident in the town of Fullerton, where decedent for whose death the present plaintiff in error is suing, was killed. If the rule announced in the *Warnock* case, *150 Ky., 76,* applies, still he was a *trespasser* whose presence on the track should have been anticipated, and a lookout duty was owed to him. In the one case he was a trespasser to whom no lookout duty was owed; in the other, a trespasser to whom a lookout duty was owed, and a duty to run the train at such a speed that injury to trespassers whose presence on the track should be anticipated, might be avoided. *I. C. R. R. Co.* v. *Murphy, 123 Ky., 787; Louisville & Nashville R. Co.* v. *Marlow, 169 Ky., 140.*

The precise question involved on this writ of error is this:— When a non-resident is sued for damages caused by its own negligence, and a resident is joined as a defendant whom it is claimed is liable also for the negligence of the non-resident, is there in the suit a controversy wholly between citizens of different states, when no cause of action is stated in the petition against the resident? The law of Kentucky, as settled by its highest court, determines this question, and is conclusive of it in the courts of the United States. *Chicago Ry. Co.* v. *Willard, 220 U. S., 414; Ill. Cent. R. Co.* v. *Sheegog, 215 U. S., 308; Chicago R. Co.* v. *Whitaker, 239 U. S., 421.*

The proper *construction* of a pleading in a state court is a question of local law, and the courts of the United States are bound by the decisions of the highest court of the state as to that matter. *Alabama & Great Southern Ry. Co.* v. *Thompson, 200 U. S., 206; Glenn* v. *Sumner, 132 U. S., 152; Bond* v. *Dustin, 112 U. S., 604; Bryson* v. *Gallo, 180 Fed., 70.*

The question now presented for decision is, therefore, this: When the petition for removal was filed in the Greenup Circuit Court, did the plaintiff's petition, under the laws of Kentucky, state a cause of action wholly between her and the defendant, The Chesapeake & Ohio Railway Company, a Virginia corporation?

Assuming that the petition does state a cause of action against The Chesapeake & Ohio Railway Company, the lessee of the road, which was operating it at the time of the accident, then two questions arise;

1. Did the petition state any cause of action against the Maysville & Big Sandy Railroad Company, the owner and lessor of the road?

2. If not, was there in the suit a controversy wholly between plaintiff in error, a citizen of Kentucky, and defendant in error, The Chesapeake & Ohio Railway Company, a citizen of Virginia?

These two questions must be determined by the law of Kentucky. In other words, this court will determine, in the light of the statutes of Kentucky, and the decisions of the Court of Appeals of Kentucky, what is the law of Kentucky on these questions. *Chicago Ry. Co.* v. *Schwyhart, 227 U. S., 184.*

The law of Kentucky is that a suit by a citizen of Kentucky, nominally against two defendants, one of whom is a non-resident who committed the alleged wrongful act, and the other a resident of Kentucky against whom no cause of action is stated. involves a controversy wholly between citizens of different states, and therefore can be removed to the federal court. The allegations of such a petition which attempt to state a cause of action against the resident defendant, on account of the alleged wrong of the non-resident defendant, must be treated as *surplusage*. This was expressly decided in *Cincinnati, &c., Ry. Co.* v. *Robertson, 115 Ky., 862; Slaughter* v. *Nashville, &c., Ry. Co., 91 S. W., 744: Davis* v. *Chesapeake & Ohio Railway Company, 116 Ky., 156.*

1. No cause of action was stated in the petition against the lessor, the Maysville & Big Sandy Railroad Company. The petition shows that decedent was a trespasser, and that his peril was not discovered by those operating the train in time to have prevented the accident. *Chesapeake & Ohio Railway Company* v. *Watson, 170 Ky., 254; Chesapeake & Ohio Railway Company* v. *Nipp, 125 Ky., 49.*

In the brief for plaintiff in error, it is claimed that decedent was a licensee on the railroad track, when he was killed. The case relied on to support that position (*Chesapeake & Ohio Railway Company* v. *Warnock, 150 Ky., 77,*) does not support it. It holds that where the population is dense and the danger to persons on the track is great, the railroad company operating trains on it should keep a lookout for *trespassers*. In other words, it lays down the same doctrine laid down in *L. & N. R. Co.* v. *Marlow, 169 Ky., 140.* In the later case of *Watson*

v. *Chesapeake & Ohio Railway Company, 170 Ky., 261,* the court says as to this rule laid down in the Warnock case:

> "This rule has, however, not been applied to all places where persons have used the track in considerable numbers. Its operation has been confined to public crossings, to populous communities, cities, towns, streets, and other places, where the people have the right to be and go..... The mere use of a railroad track by the public does not convert the users from trespassers to licensees, unless it is at a place where the public have a *right* to go and to be."

That case involved an accident in the town of Fullerton (where the accident here in question occurred.) It was held that the decedent was a trespasser. Fullerton is an unincorporated town of four or five hundred inhabitants.

The allegation in the petition of plaintiff in error is that "while her intestate, A. J. McAllister, was a traveler and passing at a place in the said town of Fullerton, where numerous people were accustomed to be and travel, which fact was at all times well known to all these defendants" he was run against and killed. That is not an allegation that he was ever licensed or invited by either of the defendants in error to go upon the track at that place. At most it shows that the company operating the train should have been on the lookout for trespassers on the track at that place, and have kept the train running slow enough to avoid injury to them when seen. *Ill. Cent. R. Co.* v. *Murphy, 183 Ky., 787.*

In *L. & N. R. Co.* v. *Marlow, 169 Ky., 140,* the court, in referring to all those cases in which it had been held that a railroad company owes a lookout duty to persons on the track in cities and towns where people have used the track in considerable

numbers and for a long period of time without objection, says:

> "In cities and towns, or thickly populated communities, where the people generally have used the track of the railroad company for a considerable length of time, out of humane reasons and for a due regard for life and limb, the law raises a presumption that such use of the track is by acquiescence of the company and impose the duty upon it while using its tracks at that place, in the operation of its trains to anticipate the presence of persons so using it and to exercise a corresponding degree of care in approaching said place to keep a lookout to discover the presence of persons on the track there and to exercise the same care in the control of the movement of its trains at such places and to have them under reasonable control to prevent injury to any one so using the track at that place. L. & N. R. R. Co. v. Beach, 129 Ky., 775; Shelby v. C. N. O. & T. P. Ry. Co., 85 Ky., 224; Connelly v. C. N. O. & T. P. Ry. Co., 402; I. C. R. R. Co. v. Flaherty, 139 Ky., 147; L. & N. R. R. Co. v. McNary, 128 Ky., 408; I. C. R. R. Co. v. Murphy, 123 Ky., 787; Southern Railroad in Kentucky v. Sanders, 145 Ky., 679.
>
> An examination of these cases will show that there is no effort made through the rule announced by them to convert the user of the track at such place from a trespasser into a rightful user or licensee."

Whether decedent was, under the facts alleged, a licensee or a trespasser is, in its last analysis, a question of words rather than of ideas. Strictly speaking a license is a *grant* of a privilege. The allegations of the petition show, at most, a simple acquiescense by the company operating the road in the use of the track by trespassers. They show no *grant* of a right or privilege.

Conceding, however, for the sake of the argument, that the

above alleged facts made the decedent a *licensee*, and not a technical *trespasser*, as the Court of Appeals of Kentucky decided in *L. & N. R. Co.* v. *Marlow*, *169 Ky.*, *140*, still it can not be soundly argued that he was licensed to be on the track at that place by anybody except by the railroad company and its employes who controlled and operated the road. He was not licensed or invited by the lessor of the road, The Maysville & Big Sandy Railroad Company.

It is clear, therefore, that the petition states no cause of action against the Maysville & Big Sandy Railroad Company.

2. The allegations of the petition which attempt to state a cause of action against the lessor, the Maysville & Big Sandy Railroad Company, must be rejected as *surplusage*, in determining the removability of the case. *Cincinnati, &c., Ry. Co.* v. *Robertson*, *115 Ky.*, *862*.

It results unavoidably that, under the law of Kentucky, there was in the suit a controversy wholly between plaintiff in error, a citizen of Kentucky, and defendant in error, The Chesapeake & Ohio Railway Company, a citizen of Virginia, and the suit was therefore removable.

The decisions of this court in *Ill. Cent. R. Co.* v. *Sheegog*, *215 U. S. 322*, and *Chicago R. Co.* v. *Willard*, *220 U. S.*, *414*, are not in conflict with this conclusion. In truth, they are both authorities which support it.

The law of Kentucky is that a lessor of a railroad is liable to an employe of the lessee for a defective condition of the *roadbed*. This was decided by the Kentucky Court of Appeals in *Ill. Cent. R. Co.* v. *Sheegog*, *126 Ky.*, *252*. The ground upon which it was held by the Kentucky Court that a liability existed

against the lessor in that case was that there was an unsafe roadbed. Justice Holmes, delivering the opinion of this court *Ill. Cent. R. Co.* v. *Sheegog*, *215 U. S.*, *322*, speaking of the Kentucky Court's opinion, says:

> "The court, however, then goes on to refer to a distinction taken in a later Kentucky case between torts arising from negligent operation and those resulting from the omission of such duties as the proper construction and maintenance of the road (Swice v. Maysville & Big Sandy Railway Company, 116 Ky., 253, 75 S. W. 278), and quotes, with seeming approval, decisions in other states, limiting the liability of the lessor to the latter class. But it then proceeds to show that the recovery in this case is upon a breach of a duty to the public, and that, according to the declaration and the verdict, the injury was due, in part, at least, to the defective condition of the road."

That this correctly construes the opinion of the Kentucky court is apparent from this language in the opinion, page 277:

> "It was alleged and proved that the intestate's death was the proximate result of the failure of the lessor to perform its public duty *in its failure to construct a safe roadbed.*"

In explaining that opinion in the later case of *Clinger* v. *Chesapeake & Ohio Railway Company*, *128 Ky.*, *747*, the Kentucky court said:

> "In that case (the Sheegog case) the question considered and determined was as to the liability of the lessor to an employe of the lessee, who was killed by negligence, and the lessor was made responsible because of *defective roadbed.*"

In short, the rule in that Sheegog case was that the lessor company was liable for its own negligence in failing to provide

a safe roadbed. The law of Illinois, as determined by its Supreme Court, is that when a railroad is leased under legislative authority, the lessee operates the road as a mere servant or agent of the lessor. This is decided in the opinions of that court quoted in *Chicago R. Co.* v. *Willard*, *220 U. S.*, *424*. In one of the Illinois opinions there quoted (*Chicago R. Co.* v. *Hart*, *209 Ill.*, *414*,) it is said:

> "Though a railroad company may, by lease or otherwise, entrust the execution of its charter powers and duties to a lessee company, this court has expressed the view that the lessee company, while exercising such chartered privileges or chartered powers of a railroad company, is to be regarded as the servant or agent of the lessor company."

It was hence logically reasoned out in that case that the lessor company was liable to a servant of the lessee for negligent operation of the train by the lessee.

This court in its opinion in that case accepted this doctrine of the Illinois court in reaching the conclusion that a cause of action was stated against the lessor and lessee both, and that the cause of action was joint.

In *Chicago R. Co.* v. *Schwyhart*, *227 U. S.*, *184*, it was said that when a cause of action is stated against two defendants the only questions necessary to determine, in order to defeat a removal on the ground of fraudulent joinder, were whether there was a real intention to get a joint judgment, and whether there was *colorable* ground for such a joint judgment. In other words, the only question that need be *colorable* was the right of joinder, and not the right of *action*. This court did not decide that a *colorable* right of action against a resident defendant was all that was necessary in order to prevent a re-

moval. In that case there was an *actual*, and not a *colorable* right of action states against the resident defendant. This was expressly decided in that identical case, in *Chicago R. Co.* v. *Whiteaker*, *239 U. S.*, *451*. The colorable right which the court speaks of is the right to join two defendants against whom a cause of action is stated; the actual right which must be joined is a cause of action against the resident defendant.

The law of Kentucky is that the lessee of a railroad, under a valid lease, is not a mere servant or agent of the lessor. The lessor is not liable, under the law of Kentucky for all the torts of the lessee. The point we are stressing in this case is not that the resident defendant was fraudulently joined (although he was, as is conclusively shown above), but that the lessor was not liable at all, that no cause of action was stated against him. In brief, our position is that not only no cause of action was stated against the resident defendant, the Maysville & Big Sandy Railroad Company, but that the petition of plaintiff in error affirmatively shows that she had no right of action against that company.

In the case of *McCabe* v. *Maysville & Big Sandy Railroad Company*, *112 Ky.*, *861*, the Kentucky Court of Appeals held that a lessor of a railroad was liable for an injury to a *highway traveler* caused by the negligence of the lessee. In the case of *Swice* v. *Maysville & Big Sandy Railroad Company*, *116 Ky.*, *253*, it held that the lessor was *not* liable to a servant of the lessee for the negligence of the lessee. Whether the lessor would be liable for an injury to a *trespasser* on the track, caused by the negligence of the lessee in *operating* trains on

the road, has never been squarely decided by the Kentucky court.

The ground upon which the Kentucky court reasoned out that the lessor was liable to a *highway traveler* in the McCabe case, was that the charter of a railroad company imposes duties to the public, and that it is not released from such duties by a lease of its road under legislative authority.

But is a *trespasser* on the railroad track a member of the traveling public, within that doctrine? We submit that he is not. *Members of the public* who have a right to rely upon the discharge of the public duties put upon a railroad company by its charter, are clearly defined by Judges Taft and Lurton in their opinion in *Hukill* v. *Maysville & Big Sandy Railroad Company, 72 Fed., 752.* They say:

> "Such persons are *shippers*, who have a common law right to demand of the common carrier that he shall carry their goods safely, *passengers*, who have a common law right to demand of the common carrier that they shall be carried safely to their desination, and *travelers upon the highway*, who have a statutory and common law right to such a reasonable and careful operation of the road as shall not unduly injure them in the pursuit of their lawful rights."

A trespasser on a railroad track is not a *traveler* on *a highway*, such as a person using a turnpike road which *crosses* a railroad track, or a city *street* in which a railroad track is located.

The same idea is shown in the opinion of Judge Hobson, in the McCabe case, where he says:

"The obligation to fence the tracks for the protection

of stock, or to receive passengers or freight, or carry them safely, is no more a duty of the lessor imposed upon it by its charter, than its duty to avoid injury to the *traveling public.*"

The same thought is expressed in the opinion in the case of *Clinger* v. *Chesapeake & Ohio Railway Company, 128 Ky., 747,* where it is said:

"Clinger was not an employe, but a member of the *public traveling* on one of the *streets* of the city of Maysville."

The duty which a railroad company owes to its employees and to trespassers is not a duty *to the traveling public* which is put upon it by its charter. The duty not to wantonly and negligently injure a trespasser, after his peril is seen, or should have been seen, is a duty imposed on everybody alike, individuals and corporations. It is not a duty that arises out of, or is founded on, a charter contract. It is not a duty assumed by a corporation in consideration of a grant of franchises to it. The duty would exist just the same without any grant of franchises. A trespasser is not a member of the traveling public, any more than a servant of the lessee company is a member of the traveling public. When a man is walking on a public highway, he is where he has the right to be, even where that highway crosses a railroad track. When he is walking on the streets of a city, he is where he has the right to be, even though a railroad track is laid down in that street. The right of a railroad company to lay its track across, or along, a public highway carries with it a duty to the public who have the right to use that highway. It does not follow because a railroad company assumes by its charter a duty to everybody using

a public highway which crosses its track, that therefore it assumes a duty by accepting its charter not to wantonly injure a *trespasser*. The latter duty exists independently of the charter contract. It is a duty not based on contract at all, but imposed on everybody alike.

The law of Kentucky is that a petition nominally against two defendants, which fails to state a cause of action against one of them, involves a controversy wholly between citizens of different states where the defendant against whom a cause of action is stated is a citizen of a different state from the plaintiff, and can therefore be removed from the state to the federal court.

The fact then is patent under repeated decisions of the Court of Appeals of Kentucky that the petition of plaintiff in error did not state any cause of action against the lessor company, the Maysville & Big Sandy Railroad Company, even conceding, for the sake of the argument, that it did state a cause of action against the lesee company, The Chesapeake & Ohio Railway Company. All the allegations which attempt to state a cause of action against that company must, under the law of Kentucky, as construed by the Court of Appeals, be treated as *surplusage*.

Assuming, however, that the law of Kentucky is not conclusive as to the question here involved, the question remains whether, under the law as construed by the federal court, this cause is removable. That question may be stated thus:

Where a defendant is sued in a state court for an injury caused by him, and a third person is joined as defendant in the suit against whom no cause of action is stated, is the other

defendant, being a non-resident, entitled to a removal of the suit to the federal court? That he is has been decided in numerous cases. We have not found a single case to the contrary.

But the ground upon which a removal is sustained in such cases, has not been always stated in the same way by the different courts. Justice Brewer in *Nelson* v. *Hennessey*, *33 Fed.*, *113*, puts it upon the ground that the defendant, against whom no cause of action is stated, is a *formal or nominal* party, whose citizenship must be disregarded in determining the jurisdiction. The same idea is expressed in *Rivers* v. *Bradley*, *53 Fed.*, *305*; *Willard* v. *Spartansburg, &c., R. Co.*, *124 Fed.*, *796*, and *Axline* v. *Toledo R. Co.*, *138 Fed.*, *168*. This is, in substance, the doctrine of the Kentucky court as laid down in *Cincinnati, &c., Ry. Co.* v. *Robertson*, *115 Ky*, *862*.

In the *Willard* case, Judge Simonton decides that because no cause of action was stated against the resident defendant, he was not a *necessary* nor *proper* party to the suit, and that on this ground the non-resident defendant had a right to remove the suit to the federal court; and that it was not necessary to determine whether the resident defendant had been fraudulently joined to defeat the removal.

Judge Amidon, in *Floyd* v. *Shenango Furnace Co.*, *186 Fed.*, *539*, puts the rule on the ground that the joinder of a resident against whom no cause of action is stated, with a non-resident defendant, is necessarily fraudulent, or the highest evidence of fraud.

In *Bryce* v. *Southern Ry. Co.*, *122 Fed.*, *709*, it is suggested that in such case there is *a separable controversy* between the plaintiff and the non-resident defendant.

In *Lockhard* v. *St. Louis R. Co.*, *167 Fed.*, *675*, where the suit was held to be removable by the company on the ground that the petition stated no cause of action against the servant, Judge Rogers puts the matter this way:

> "It follows that there is no cause of action stated against the engineer in any aspect of the complaint. The real cause of action in this suit is one against the railroad company only, in which Daniels is made a party without any semblance of liability, joint or otherwise. It matters not, therefore, whether the intent of the pleader was to make Daniels a party *to defeat the jurisdiction* of the court or not, since, in any event, without reference to the purpose, the complaint states no cause of action, as stated, against him, and no cause of action being stated against him, the railroad company had the right to remove the cause against it to this court. In other words, the cause of action is made separable because there is no cause of action stated against Daniels."

The Removal Act says nothing about *fraudulent joinder*, or *separable controversy*, or *formal parties*. The phraseology used in the statute is "a controversy which is wholly between citizens of different states and which can be fully determined as between them." A suit which states no cause of action against a citizen of a different state from the one of which plaintiff is a citizen is clearly embraced by that clause of the Removal Act. It is, hence, not necessary to determine whether in such case the defendant against whom no cause of action is stated, is a nominal party, or whether his joinder as defendant is fraudulent, or whether there is in the case a separable controversy. Whatever may be thought about those matters, the fact is, that there is in such a suit "a controversy that is wholly between citizens of different states, and that can be

fully determined as between them." Upon that proposition the authorities are practically unanimous. And many of the cases hold that such a cause is removable simply on the ground that no cause of action is stated against the resident defendant, without saying that he was a *formal* party only, or was *fraudulently* joined, or that there is *a separable* controversy between the non-resident defendant and the plaintiff. *Hukill* v. *Maysville & Big Sandy Railroad Company*, *72 Fed.*, *752*; *Davis* v. *Chesapeake & Ohio Railway Company*, *116 Ky.*, *144*; *Swice* v. *Maysville & Big Sandy Railroad Company*, *116 Ky.*, *853*; *Slaughter* v. *Nashville R. Co.*, *91 S. W.*, *744*; *Marach* v. *Columbia Box Co.*, *179 Fed.*, *412*; *Chicago R. Co.* v. *Stepp*, *151 Fed.*, *908*; *Kelly* v. *Chicago Ry. Co.*, *122 Fed.*, *290*.

In no case has this court ever decided, nor has any federal court, or any state court, ever decided, (so far as we have been able to find), that a non-resident defendant against whom a cause of action is stated, had no right to remove a cause because a resident was joined as defendant against whom no cause of action is stated.

The question recurs, can a plaintiff avoid the operation of that doctrine by failing to state a cause of action against the principal defendant, the one who *did* the act of which he complains? If so, all a plaintiff has to do in order to prevent a removal in every case, would be to file a petition which is demurrable by both of the defendants,—the non-resident as well as the resident,—the doer of the act complained of as well as the third party sought to be held for that act,—and then after time to plead or demur has expired, amend his petition

and state a cause of action against the non-resident. That would involve the position that no suit could be removed if the plaintiff's petition was demurrable, which is unsound. *Marshall* v. *Holmes, 141 U. S., 589.* The fact that the petition is demurrable as to both defendants may not be decisive of a right to remove. Neither is it decisive against the right of the non-resident defendant to a removal.

The law of Kentucky puts on a lessor railroad company the duty to provide a safe roadbed. To whom is this duty owed? Surely if a man should trespass on the unsafe roadbed and be caused to stumble and fall, by stepping on a rotten tie and thus be injured, it could not be said that he could sue the owner of the road and recover damages for the injury. But why? Because the duty to provide a safe roadbed is owed to the public, who have the right to have the track kept safe. It is not owed to a trespasser.

> "A railroad company is under no legal obligation to keep its yards and tracks free from pitfalls or obstructions for the safety of trespassers." *23 Am. & Eng. Ency. of Law, 732.*

In the *Sheegog* case, the Kentucky court puts the right of an employe of the lessee railroad company to recover from the lessor on account of the unsafe roadbed, on the ground that he had the right to be on the road. It quotes with approval the language of the Maine court, to that effect, in *Nugent* v. *Boston R. Co., 80 Maine, 62.* But plaintiff's intestate had no right to be on defendant's railroad track where he was when struck and killed. The duty which the lessee company owed to him was exactly the same as that it would have owed to a person who was stealing a ride on the train, the duty to use ordi-

nary care to avoid injuring him after it discovered his peril. *Skirvin* v. *L. & N. R. Co.*, *100 S. W.*, *308*, *33 Oyo.*, *915*. Would a lessor be liable for negligent injury by the lessee to a person *stealing a ride* and not be liable for an injury to a servant of the lessee *rightfully* riding on the train?

In the case of *Nugent* v. *Boston R. Co.*, *80 Maine*, *62*, *6 Am. St. Rep.*, *155*, the case so much quoted from by the Court of Appeals of Kentucky in the *Sheegog* case, to sustain the liability of the lessor to a servant of the lessee on account of an unsafe roadbed, it is said that "the only materiality which attaches to the contract between the companies, is to make certain that the plaintiff was *lawfully*, and not a *trespasser*, on the defendant's road." And in the case of *Lee* v. *Southern Pacific R. Co.*, *116 Cal.*, *97*, *53 Am. St. Rep.*, *147*, which was also much quoted from in the *Sheegog case*, to sustain the right of a servant of the lessee to recover of the lessor on account of defective roadbed, the court said:

> "Plaintiff has pleaded and shown to the satisfaction of the jury, that *he was not a trespasser* upon the railroad at the time and place where he met his injury, but that he was there under a lawful employment; that in pursuit of his vocation he met with an injury occasioned by defendant's defective construction of its roadbed, for which injury the defendant is in law responsible."

In short, the only ground upon which it was reasoned out that the lessor was liable to a servant of the lessee for an injury caused by the negligence of the lessee, was that the servant was *not* a trespasser. These cases are therefore authorities for the position that the lessor is not liable for an injury to a trespasser caused by the negligence of the lessee.

It is respectfully submitted that the motion to remand should have been overruled, and the judgment of the court below should be affirmed.

E. L. WORTHINGTON,
W. D. COCHRAN,
LeWRIGHT BROWNING,
PROCTOR K. MALIN,
Counsel for Defendants in Error.